

89-1083

No.

Supreme Court, U.S.
FILED
DEC 30 1989
JOSEPH E. SPANGL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

J.I. HASS CO., INC.,

Petitioner,

against

GILBANE BUILDING COMPANY,

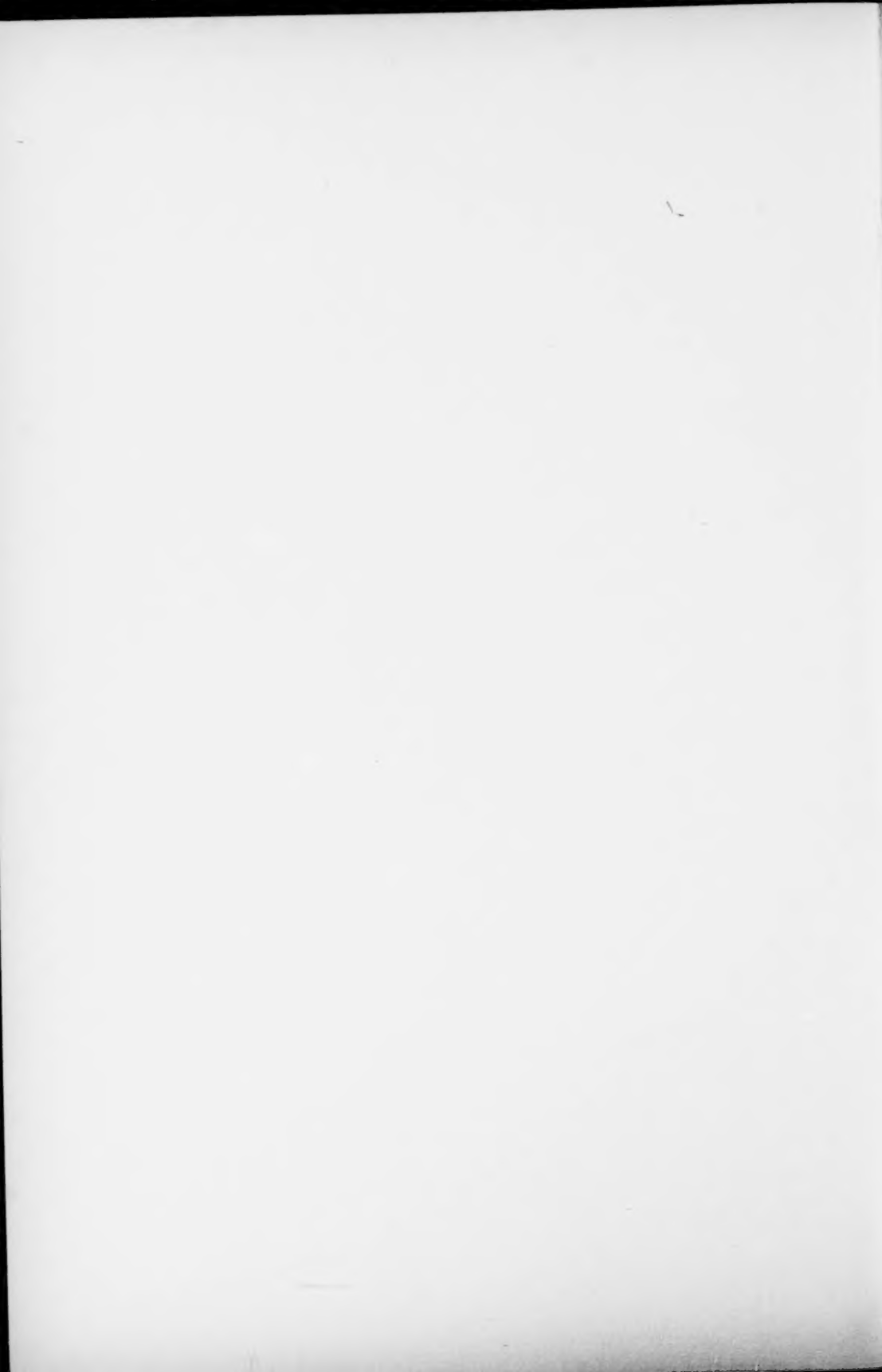
Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Questions Presented for Review

1. In absence of a clear, erroneous error of law and, in fact, no legal precept shown to be in error, was it not error for the Court of Appeals to deprive the Petitioner of its Bill of Rights under the Seventh Amendment of the Constitution, by an attempt to substitute and apply its interpretation of the facts, for the findings and determination of the jury?

2. Can the Court of Appeals assume the power to interpret and make a re-examination of facts on the basis that the United States District Court by denying the notion of the unsuccessful party for a judgment N.O.V. and for a new trial, *ipso facto*, raised a legal precept which entitles it to a plenary review, without referring to the legal precept; and further does that empower the Court of Appeals to go beyond interpreting the law and either construing, interpreting and making conclusions of facts which, in many essential areas, are contradictory to uncontested testimony, facts or positions as appears in the entire record?

3. If there is no error shown to exist in the United States District Court's legal pronouncements, as contained in the Charge or Instructions to the jury, can the Court of Appeals, based on its limited knowledge of the whole record, disagree with the jury's application of the law to the facts, deprive the successful party of its Constitutional right to trial by jury?

4. Was the Court of Appeals correct in applying the principle of the *parol evidence rule* to eliminate the testimony in the record concerning past history of similar working relationships and all other circumstances which would give meaning to the intent of the parties?

5. Did the Court of Appeals commit error contrary to the laws of other jurisdictions in failing to recognize that the original contract and the second contract which they formed as a Change Order, were not to be considered together and perform the duty of the courts to harmonize the answers to specific interrogatories submitted to jury and "attempt to reconcile the jury's findings by exegesis if necessary . . ." before disregarding jury's special verdict and remanding case, as provided in *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 9 L.Ed. 2d 618, 627 (1963).

Parties Below

All parties below are parties to this Petition. An *amicus curiae* brief was filed by the Building Contractors Association of New Jersey, at the request of Gilbane and a copy of this Petition will be served upon their attorneys.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

J.I. HASS CO., INC.,

Petitioner,

against

GILBANE BUILDING COMPANY,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT, DISTRICT OF NEW JERSEY

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit**

The petitioner, J.I. Hass Co., Inc., pray that a writ of *certiorari*, issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above entitled proceeding on August 8, 1989 and on the denial of the Petitioner for Rehearing *en banc*, entered on October 18, 1989.

Opinions Below

The written opinion of the United States Court of Appeals for the Third Circuit is reproduced as Appendix E.

The Order of the United States Court of Appeals for the Third Circuit denying the petition for an *en banc* rehearing dated October 18, 1989, as reproduced as Appendix F.

Jurisdiction

This case was tried before the United States District Court for the District of New Jersey, the Honorable John W. Bissell presiding, (under a complaint filed pursuant to 28 U.S.C. §1291 (1982)), for a period of approximately three and one-half months of extensive testimony, and the jury returned its verdict on February 25, 1988 in the amount of \$1,461,872.73. It results from the sum of \$2,150,628.87 which represented the actual costs incurred by the plaintiff, J.I. Hass Co., Inc., plus overhead and profit, as being the reasonable value of all the work done on the project, less a credit of \$688,256.00 which was paid on account. From this was deducted an allowance of \$63,000.00 for touch-up, \$1,563.00 for undone work and \$177,688.00 as a deduction of a 10% profit credit on the award to plaintiff. (App. 159-161.) The Court reduced the award by \$31,000.00 so that the final amount of the damages award was \$1,188,621.63. The Court added to this prejudgment interest of \$291,908.00, based only on the admitted balance of \$431,130.00 and, therefore, entered judgment on May 25, 1988 *nunc pro tunc* as of February 25, 1988 in the total sum of \$1,480,529.63. (See Appendix "B" attached.)

Notices of Appeal were filed by Gilbane Building Company as to the merits of the case, and by J.I. Hass Co., Inc. only as to the issue of interest, pursuant to 28 U.S.C. §1291 (1982). (See Appendix "C" and "D" attached.)

The defendant-appellee/cross-appellant had filed a Notice of Motion for judgment N.O.V./or new trial and/or remittitur which, except for reduction of the amount of the judgment in the sum of \$31,000.00, was denied by Order dated March 14, 1988. (See Appendix "A" attached.)

This matter on appeal was argued before the Honorable Judges A. Leon Higginbotham, Walter K. Stapleton and Robert E. Cowen on February 28, 1989 and their Opinion was rendered and filed on August 8, 1989. (See Opinion attached as Appendix "E".)

Under said decision, the Court, vacated the judgment of the District Court as to the First Count of the Complaint and ordered a remand of the same for a new trial consistent with the Opinion.

Plaintiff-appellant/cross-appellee filed a Petition for Rehearing *In Banc* under *Fed. R. App.*, P35(b) and 40(a) and the Court of Appeals for the Third Circuit entered its Order of denial on October 18, 1989. (See Appendix "F" attached.)

The jurisdiction of this Court to review the Order of the United States Court of Appeals for the Third Circuit is invoked under 29 U.S.C. §1254(1) (1988).

Statement of the Case

Gilbane Building Company of Rhode Island ("Gilbane") was a prime contractor of Miller Brewing Company

("Miller") for the erection of a beer brewing facility in Trenton, Ohio. J.I. Hass Co., Inc. ("Hass") was a painting contractor who was invited, as one of several others, by Gilbane to submit a proposal to them for buildings known as the Glass Warehouse Building, Brewhouse, Power House and Office Building. Said bid was submitted on November 14, 1980 for a sum of money which was, by negotiations agreed upon, in the amount of \$295,000.00. Although the Room Finish and Color Schedule referred to the Glass Warehouse for said bid, this area was a part of the Packaging and Warehouse Building, referred to in said schedule and which was to be let out at a later date. Many of the drawings as to these buildings contained references to plumbing, electrical, fire protection, HVAC and duct work, which the Court of Appeals referred to as "mechanical systems". In a letter from Hass to Gilbane dated November 17, 1980, it was stated that "all equipment, including tanks, silos and their concerning work, mechanical, electrical and HVAC work excluded". Only piping and ducts within a specified closeness to the ceiling or walls to be painted. Also, Schedule "B", referring to this Contract, provided for the exclusion of such work, which was carried through to the so-called Change Order No. 1, as an amendment to the originally intended Contract.

The intended Contract for this scope of work, in the sum of \$295,000.00, was set forth in a subcontract form dated March 24, 1981 prepared by Gilbane.

Under date of March 31, 1981, the work for additional buildings consisting of the Packaging and Warehouse area, Aging, Fermenting and Cold Service, and the Rail Shed and Grain Drying was let out by a formal invitation to bid and not as a Request for a Change Order, pursuant to the original intended "subcontract", to various paint-

ing subcontractors and the proposal of Hass which was required to and, in fact, submitted by 4:00 P.M. on April 15, 1981. The bid was based upon the drawings as to the Packaging and Warehouse buildings (which constituted 65% to 70% of the combined contracts) that were available and received by Hass prior to April 15, 1981. The only Color and Room Finish Schedule drawing pertained to architectural and structural work and not mechanical. The communication between Hass and Gilbane was that it would only be architectural and structural. A letter of intent to award the painting work to Hass was issued on May 26, 1981 for the total sum of \$753,000.00.

The testimony is undisputed that the execution of the intended original subcontract dated March 24, 1981 and the submission of the proposal of April 15, 1981 which, after awarding this work to Hass, Gilbane elected to classify as Change Order No. 1 and dated June 1, 1981, were both prepared by Gilbane and executed at the same time and place on August 18, 1981. The testimony of William Kearny, a Vice President of Gilbane, was to the effect that the "Base Contract" dated March 24, 1981 and the Change Order #1, were not effective until the signing on August 18, 1981 as integrated contracts. As of that date, a considerable portion of work had already been performed.

At the time of the submission of the proposal on April 15, 1981, it was admitted in defendant's answers to Interrogatories, as well as by an abundance of testimony, direct or on cross from both sides, that the Packaging and Warehousing Room Finish Schedule did not contain Revisions 2 and 3 and, therefore, did not make any mention whatsoever of building and process piping or equipment package or mechanical work and, therefore, was not and could not have been included in Hass' proposal.

Additionally, there is a great abundance of testimony from both sides that the process piping and equipment package was to be and, in fact was at a later date let out by Miller on a separate bid on a contract to be made on a direct basis by Miller to a painting contractor under Construction Package 364 (App. at 3414), (as was the practice on prior job sites where Miller, Gilbane and Hass were involved), in accordance with Specification 9J (App. 3362).¹ On the basis of "fast tracking", drawings were made from time to time which would include not only "architectural and structural" work but all other work that was let out to other painting subcontractors, other trades and for the process piping and equipment package as referred to above. Thus, the credible testimony as to the drawings referred to by the Court of Appeals in its opinion, was as to work which the jury in its determination could and must have found that such work could not and was not included in Hass' scope of work.

Hass had performed a considerable amount of work on the building of the original intended contract and under C.O. #1, and the first time that Hass was requested to perform work, which they considered to be out of their scope, protests were made and the only work which was done, as it related to other than architectural and structural, was pursuant to a protest. On the cold service area, which the Court said was a part of the June 1, 1981 C.O. #1, the Project Manager of Gilbane, in a letter to Hass, referred to the catwalks above the fermenting tanks and to Change Order which would be forthcoming and stated that Gilbane appreciated Hass' cooperation in proceeding with this work (App. 3547), which was responded to by Hass by stating that the said work was not within their

¹See Exh. P36, App. 3514-3517 in invitation of Miller as to Mechanical Equipment and Piping. "It also includes the painting of supports, piping, duct work, ladders, catwalks, rails, platforms . . . which might be furnished with the Equipment."

scope of work and that they were proceeding on the basis of a promise of a Change Order, to cooperate to perform the work on the sprinklers and cold storage areas so that the job would not be held up (App. 3548). The president of Gilbane, by letter in evidence, induced Hass to proceed with all work including work done under protest (Transcript Exh. P60, P61, P63, P64, App. 3514-3577), on the promise of making an adjustment. There is also testimony that Gilbane, in turn, passed on these protests to Miller as a claim beyond the scope of its and Hass'² work.

The claim of Hass is founded upon seven different Counts—the First is based upon there being no contract concluded by reason of no meeting of the minds and for recovery on *quantum meruit*. The Second is based upon the endless proof of lack of coordination, interferences, etc., chargeable to Gilbane, so Hass could not perform work in sequence and economically, causing damages to the plaintiff to such a degree that it vitiated any Contract and, therefore, recovery should be on *quantum meruit*. The Third Count is based upon reformation by either mutual or unilateral mistake and unconscionable and unjust harm and damage to the plaintiff. The Fourth Count is in the alternative, seeking recovery of the balance due under the putative Contract and Change Order in the sum of \$431,130.00, which is undisputed. The Fifth Count was for recovery of the extras of \$144,682.00, which seems to be the only matter that is placed in issue in the Opinion of the Court, and the Sixth Count, which is the largest part of Hass' claim, was for the myriad of interferences, lack of coordination and other failures of performance by Gilbane, causing damages to Hass which, in this case, was

²See letter of David A. Ricke, project engineer for Gilbane, to Miller which stated, contrary to the finding of the Court (Pg. 12) that Gilbane was proceeding to "paint" the sprinkler lines in Package and Warehouse under protest and would do no further work on this category. (App. 3529.)

calculated on a total cost method. The Seventh Count was for punitive damages, which was dismissed by the trial Court.

The trial Court below allowed interest only on the balance of the Contract of \$431,130.00 in the sum of \$291,908.00, which was disputed by plaintiff-appellant/cross-appellee as being insufficient.

These, of course, are not the full facts, pursuant to the testimony of three and one-half months, consisting of over 4,000 pages and some hundreds of exhibits. However, the Statement of Facts will only support some of the main issues being presented for this Petition.

REASON FOR GRANTING THE WRIT.

POINT I.

The petitioner has been deprived of its right to trial by jury.

At this 200th anniversary of the Bill of Rights, the Constitutional right of a jury trial should be re-affirmed so that the courts do not in practice deprive a litigant of its right to a jury trial.

The Seventh Amendment of the United States Constitution provides,

"In suits of common law where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any Court of the United States then according to the rules of the common law". U.S.C.A. Amendment VII—Civil Trials.

After three months of trial before a conscientious jury, directed by a competent Judge, which resulted in a transcript in excess of 4,000 pages and over 350 exhibits, the Court of Appeals not only attempted a construction of facts, the weighing of credibility, disregarded the facts and testimony from which the jury relied upon but in some most essential elements of building its opinion, re-wrote the script, as is summarized herein and, as a consequence, did deprive the plaintiff of its \$1,480,529.63 damages sustained.

The principles of the amendment and the case law supporting this right is fundamental that the right is to be preserved to the successful party in the trial of the issue and that neither the Supreme Court nor the Court of Appeals can re-determine the facts as found by the jury. See *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Limited*, Pa. 1962, 82 S.Ct. 780, 369 U.S. 355, 71 L.Ed. 2d 798, 807, rehearing denied, which stated that "For the search for one possible view which will make the jury's finding inconsistent, results in a collision with the Seventh Amendment."

In the case of *Lame v. United States Department of Justice*, 767 F.2d 66, 69 (3rd Cir. 1985), the Court stated:

"... when we are dealing with facts, our function is not to retry issues of fact *de novo* or substitute our judgment with respect to such issues for that of the trier of facts. We are called upon to simply determine whether, as a matter of law, the permissible findings sustained the judgment. As to those factual findings of the district court, we are governed by a clearly erroneous rule of review. Fed. R. Civ. P. 52(a) and that refers only if the findings are unsupported by substantial evidence, lack adequate evidential support in the record, are against

the clear weight of evidence and where the District Court has mis-apprehended the weight of its evidence”.

The determination as to whether there was a meeting of the minds, under the circumstances of this case, as will be detailed in the next Point, is not a legal issue but was dependent upon the interpretation of the facts presented by both parties. It is almost elementary to state that if there was no meeting of the minds, there was no legal contract for the Court of Appeals to exercise a plenary review as an issue of law.

For the proposition that the Court of Appeals will not substitute its judgment for that of the verdict and usurp the jury's function as per findings of fact, see *Collins v. Signetics Corp.*, 605 F.2d 110, 115 (3rd Cir. 1979). The Court rejected the appellant's contention that the evidence was insufficient to sustain the jury verdict. See also *Leeper v. United States*, 756 F.2d 300, 308 (3rd Cir. 1985). In the case of *Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095, 1099 (3rd Cir. 1980), the Court stated:

“A jury verdict carries with it the benefit of all reasonable inferences capable of being drawn therefrom and an appellate court is bound to interpret the evidence in the light most favorable to the verdict winner . . . Any fact that the jury could have reasonably inferred from the evidence in favor of the verdict winner will be presumed to have been so inferred when the court reviews the record supporting the verdict . . .”.

See also *Green v. U.S.X. Corp.*, 843 F.2d 1511, 1535 (3rd Cir. 1988).

The Court of Appeals in the case of *Dawson v. Chrysler Corp.*, 630 F.2d 950, 959 (3rd Cir. 1980) in dealing with an appeal from a denial of motion for a directed verdict or for a judgment notwithstanding the verdict, stated that the role of the Court in reviewing the record was a limited one and that the function of the Appellate Court was:

“To review the record in this case in the light most favorable to the non-moving party . . . and to affirm the judgment of the district court denying the motion unless the record is critically deficient of the minimum quantum of evidence from which a jury might reasonably afford relief”.

The jury below, after a review of all the facts based upon the testimony and documentary evidence, came to the conclusion, as appears in the Jury Question/Verdict form, that the plaintiff had proven that there was no contract between plaintiff, Hass, and defendant, Gilbane. (A159.) This was in accordance with the charge made to the jury and, in particular, the charge as to the meeting of minds of the parties. (A121 to A148.)

See also the following cases: *Parsons v. Bedford*, Pa. 1830, 28 U.S. 433, 3 Pet. 433, 7 L.Ed. 732. See also *Dawson v. Chrysler Corp.*, C.A. N.J. 1980, 630 Fed. 950, certiorari denied, 101 S.Ct. 1418, 450 U.S. 959, 67 L.Ed. 383; *Smith v. Illinois Cent. R. Co.*, C.A. Tenn. 1968, 394 F.2d 254; *Liberty Mutual Ins. v. Thompson*, C.A. Tex. 1949, 171 F.2d 723, which stand for the proposition that the United States Court of Appeals has no jurisdiction to re-examine facts tried by the jury, nor does the Court of Appeals have the authority to modify the verdict of the jury which passed on the issues of fact. *Hartnett v. Brown & Brigham*, C.A. Wyo. 1968, 394 F.2d 438.

Although the Court of Appeals cited cases as to the limitations or prohibitions of the review of the decision reached by a jury, it then, having said the words, turns away and disregards the jury's deliberative process by the justification that the district court's denial of the motion for a new trial was based on its application of a legal precept, granted it an unfettered license to review this deliberative constitutional process in a plenary and *de novo* manner. It cites *Honeywell v. American Standards Testing Bureau*, 851 F.2d 652, 655 (3rd Cir. 1988), cert. denied, 109 S.Ct. 795 (1989). This cited case involved the consideration of a legal precept of law as to the nature and character of proof needed to establish the claim. The Court of Appeals in the case *sub judice* does not define what legal precept was applied, erroneously or otherwise, by the trial Court. The Court of Appeals, in its approach, would tear down the fabric of the Bill of Rights' guarantee in its seizure of the fact deliberative powers of the jury for its plenary review by saying that, if the District Court denied the Motion for a new trial or for judgment N.O.V., that it is a legal application and the Court of Appeals could not only review whether the law as applied was erroneous but had the right to deal with the factual issues.

Compare this to the argument of *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 319 (3rd Cir. 1986). Nowhere does the Court of Appeals point out that the charge to the jury was "clearly erroneous" or contrary to law. (See A121 and A158.)

A partial listing of the issue oriented items indulged in by the Court of Appeals (which we seriously argue, went beyond the authority of that Court), and which not only disregarded the genuine issues of material fact, but adopted a series of findings that are contradicted and un-

disputed, so that judgment could not properly be entered, by a reversal in favor of Respondent, as a matter of law.

1. The Court of Appeals constructed its thesis of a case that involved a contract or one that was intended, and the emergence of change orders to that intended contract, as argued by defendant and the *Amicus Curiae* Brief (obviously written on behalf of an association without reading the 4,000 pages of transcripts and over 350 exhibits). This was contrary to accepted practices and more important to the undisputed fact of this case.

The Court refers to a subcontract dated March 24, 1981 for \$295,000.00 in a manner that would give the impression it was executed on that date, and then concludes that, pursuant to Section 7(b) which provides for change orders, resulted in the proposal of Hass, by bid submitted on April 15, 1981, negotiated to \$753,000.00. The argument is that Hass' proposal was conceived by the terms of the originally intended contract and was an adjunct or part thereof. This is not so. The first response to this conclusion is that the original intended contract for painting awarded to Hass was for four main buildings. Change orders in the construction industry are a device by which the contractor can, usually at request of owner, require the subcontractor to do extra work within the format and character of the scope of work contemplated by contract. It certainly would not apply to the painting of some five different buildings, at a price more than twice the amount of the base contract. See *Guinon v. United States*, 69 F.Supp. 341 (Ct. of Claims, 1947) and *United States v. Merritt-Chapman & Scott Corporation*, 305 F.2d 121 (3d Cir. 1962).

In any event, the Court of Appeals was in gross error in reaching such a finding for the real and uncontradicted

facts were that the work, which became to be known as Change order 1, was awarded pursuant to a separate invitation to bid dated March 31, 1981 (App. 3497) that was submitted to some three, four or more painting subcontractors for bids. The proposals were submitted, as required, by April 15, 1981. Only because Hass was the successful bidder, did it receive the award.

If some one else was the successful bidder, separate subcontract would have been entered into with that subcontractor, as was the case where other painting subcontractors were performing work in the very same buildings where Hass was painting.

There can be no dispute to this—it was known by the District Court Judge and the jury and it is an indication of the Court of Appeals' misunderstanding of the facts, very probably resulting from the thrust of the *Amicus Curiae* Brief, that this case concerned only some change orders arising from a basic contract or subcontract. The work wound up as a Change Order prepared by Gilbane for its convenience, of an attempt to incorporate the terms of the purported contract.

2. Another very fundamental error by the Court of Appeals, which deprived the Petitioner of its right to a jury trial, was the failure to understand or acknowledge a very important link to finding or conclusion of a contract in the construction industry.

The Court in considering the claim of extras for work done under protest, relies for its authority of required work by undefined references in the Color and Room Finish Schedule, which is only a small part of the drawings. It stated that "Moreover, we find the Room Finish Schedule for the Package and Warehouse Building clearly

prescribed under the subheading of 'Process and Building Piping' ", that Hass "paint exposed non-insulated ferrous metal, App. at 4114, which undoubtedly includes sprinkler pipes". A simple response is "so what", you can't paint anything that's not already built, or bid for work that's not depicted on drawings.

A proper application of the principle of law, as enumerated by the Supreme Court of New Jersey in *Atlantic Northern Airlines Inc. v. Schwimmer*, 12 N.J. 273 (1981) of examining evidence of attendant circumstances in order to determine the intention of the parties to the contract, would have clearly demonstrated that this Room Finish Schedule that applied to other trades, to other painters, to work already covered by the Base and other contractors and also to future work to be awarded at a later date, including the Process Piping and Equipment Package, on a direct basis by Miller Brewing Company, was no more than the master specifications which described what or how work would be done, if part of the scope.

What the missing link is that you cannot give a price to paint described items of work as the sprinklers unless there are sprinkler drawings in existence, which will locate and define or quantify the extent of the scope of work. These hundreds of drawings are a vital part of the contract documents. Without such drawings it cannot be included as part of the scope of work.

a) The thousands of pages of testimony would reveal that drawings for the sprinkler were not in existence when contracts were prepared and could not be included in scope of work; that a very substantial portion of drawings were not in existence, they were out for "100%" review, they were marked "incomplete", "for information only"

or with corrected revisions dates and otherwise reviewable.

b) The testimony was uncontradicted that on the date of the bid, the Room Finish Schedule, which is not the one that appears at App. 4114, had not been received by Gilbane until April 30, 1981, so that they could not have been a part of the bid of Hass, submitted on April 15, 1981 and this item, as the two-thirds of the work of the others referred to, were not in the Room Finish Schedule at the date of the bid.

c) That the exhibit on page A4114 was an exhibit of Gilbane and, as admitted in testimony, was not received by Gilbane until April 30, 1981 (see A3496) which were received by Petitioner after August 17, 1981 (App. 3495, A3497) are some three items of painting in tunnel, which is a section of the Package and Warehouse Building, and the uncontradicted testimony that such work, as well as the last item on that exhibit of painting—exterior masonry walls—was awarded to one or more other painting subcontractors, which could only be determined by the facts elicited in this case, pursuant to the *Atlantic-Schwimmer* case. It is clear proof accepted by jury that these referred to items will become the basis for future changes or individual bids. These facts on their own give rise to strong indicia of an ambiguity, or uncertainty to even allow the introduction of parol evidence and more logically to the conclusion of no meeting of the minds.

d) The items of Process Piping, as well as many of the other listed items, were to be and, in fact, were awarded on a direct award and contract by Miller Brewing to a painting contractor, as part of the Process Piping and Equipment Package, which has to be read to understand the significance of the Room Finish and Color Schedule,

which applied to many packages for painting as well as to other trades of tiling, floor covering, etc. See testimony of William J. Kearny, Vice President of Gilbane (App. 2709, l. 8-17).

e) That not only did Hass perform that work under protest, claiming that it was not part of their scope of work but Gilbane, by its project manager, David A. Ricke (who also did not testify in this case), had written a letter on behalf of Gilbane, which is in direct contradiction of the conclusion of the Court of Appeals stating that they were (through Hass) proceeding to "paint the sprinkler lines in Package and Warehouse under protest and would do no further work on this category". (App. 3529.) It was never discovered that, in fact, Gilbane did not receive payment for this and other items of protest work from Miller in their settlement, by the rule that we could not explore occurrences during settlement negotiations; however, the protest by Gilbane contradicts, or at least, presents an ambiguity to the conclusion of the Court of Appeals.

That there were two comparison charts, which can only be interpreted that it was prepared by and came from the records of Gilbane on discovery, that stated that this work was not part of the scope of work of Gilbane and Miller and, therefore, the jury, with all other facts, concluded that it would not be part of scope from Gilbane to Hass. (A3545.)

f) If, it was so clear that, all the work listed in the Room Finish Schedules as to Packaging and Warehouse, or any of the other buildings, included all these mechanical, electrical HVAC and catwalks, then why did Gilbane immediately, after the preparation dates of originally intended contract and Change Order #1, issue in July, 1981,

a Request for Change Order (R.C.Q. #115) (App. 3476-3482) for the Aging, Fermenting and Cold Service Buildings (that contained the same items of Room Finish and Color Schedule) for painting of piping, miscellaneous, mechanical, electrical, HVAC and catwalks, and continue the consideration of these items and proposals going into December of 1981.

POINT II.

The application of affirmance of disputed contract is contrary to law.

Another clear error by the Court of Appeals is the misapplication of the case of *Merchants Indemnity Corp. v. Eggleston*, 37 N.J. 114, 137 (1962), which it cites as its only authority for its statement that under New Jersey law, parties can elect to affirm an otherwise invalid agreement by their conduct, thus barring either party from later seeking a rescission, and in entering the role of fact finding, by saying that the "review of the record," by the Court of Appeals, shows "that Hass through its conduct, elected to affirm change order no. 1."

The case, which has come to be known as the *Eggleston* case is the leading case in New Jersey, as to the body of law applied to the insurance industry, enunciating the general rule, deals with questions of waiver and estoppel, under facts where the insurer asserted a claim of fraud by the insured in connection with the policy and the insurer assumed the defense, without reservation of rights and continued to handle the defense and conduct of the case, to a point that the course could not be rerun and it would be futile "to prove or disprove that the insured would have fared better on his own." There are voluminous cases, that are distinguished by the different fact pat-

terns, since the *Eggleston* case, dealing with requirement of a showing of prejudice, and the proof of reliance, which is not discussed by the Court of Appeals. See *Griggs v. Bertram*, 88 N.J. 347, 358 (1982); *United States Cas. Co. v. Home Insurance Co.*, 79 N.J. Super. 493, 501 (App. Div. 1963). Not only are these cases inapposite to the facts of the case *sub judice*, where there was a reservation of rights, by notice that it was performing the work under protest, and that there was no prejudice to Gilbane, but was proceeding at their urging and promise to adjust the claim, but that it was another incursion by the Court of Appeals, of the right to trial by jury, by its review of the record. See the statements of New Jersey Supreme Court, in a case involving the *Eggleston* insurance issues, which stated that the factual issues, as to waiver, was a jury question, and not to be determined as a matter of law. *Bonnet, et al., v. Stewart*, 68 N.J. 287, 294 and 297 (1975).

Assuming *arguendo*, the principal of law, as stated by the Court of Appeals, it was in error by treating this case as if the only dispute was the four items of work that was done under protest and that Hass affirmed the Contract by performing this mechanical work. The facts not mentioned by the Court of Appeals show beyond dispute that the work Gilbane wanted Hass to do under its alleged contract was not limited to \$144,682.00 claim for extras of work done under protest, which alone would be more than 10% of the combined alleged contracts of \$1,040,000.00.

Unrecognized by the Court of Appeals is that the defendant, Gilbane's counterclaim, was that Hass failed to perform work under its contract, without specifying whether it was the Base Contract or Change Order #1, for a total of \$508,421.00. There was also testimony offered of greater amounts. (A 3048-3118, 3121-3127, 3131-3201

and exhibits A 4159, A 4189, A4190-4191.) The Hass testimony was that none of this work was included in Petitioner's Estimate, and Mr. Nagin Patel, Hass's Estimator told Gilbane's representative, that anyone in the construction industry would know that it was impossible to do all the mechanical work, as well as architectural and structural, for the price quoted in their proposal and as contained in the putative contract.

When Petitioner left the job on December 15, 1982, it had refused to do any such hundreds of thousands of dollars of work claiming to have completed all work pertaining to architectural and structural steel with the exception of \$1,563.00 which, it was agreed, could not be done.

So, it was not the four items that were involved but over six hundred thousand dollars, which was more than half of the combined proposals.

The Court of Appeals stated that Hass sought rescission on the ground no contract had formed between parties.³ This is not so—the claim is that no contract was formed, so it is unnecessary to rescind. The conclusion that Hass, through its conduct, elected to affirm Change Order No. 1, is totally inaccurate and against the trial contentions of Gilbane. Even the four items of work were not done without reservations but expressly under protest—which is their reservation of rights and beyond that it refused to do any of the mechanical work, either under base contract or under Change Order No. 1. A review of all the testimony will not support an absolute statement that there was no expectation by Gilbane that Hass do mechanical work on the Base Contract—in fact, one item

³See *Power-Matics, Inc. v. Ligotti*, 79 N.J. Sup. 294, 306 (App. Div. 1963) that, in a case of "*quantum meruit*", the alternative to pleading *recission*, is that is "unnecessary because the alleged express contract was actually void, or did not exist. (Emphasis added.)

was for mechanical work in Brewhouse which Gilbane stated was part of Hass' scope. A simple question arises is why would Hass write a letter to Gilbane when they submitted the proposal for the original intended contract and in the letter of intent, specifically exclude such work if the language of the agreement forming a part of the contract documents was so clear in not including mechanical work.

To conclude that there was an election to affirm an otherwise invalid agreement by their conduct, barring rescission when only a part of work was done, and this under protest because it was urged to do so by the president of Gilbane, on its promise to work it out and which Gilbane's representative claimed to Miller that it was doing it under protest and would do no more of like work and where it, in fact, refused and did not do any of the other mechanical work on the claim it was not in Hass' scope and it had finished its work, is an exercise of judicial invasion of the authority of the jury and contrary to any proof of an affirmance.

POINT III.

There was no meeting of the minds as found by jury.

The case of *Atlantic Airlines v. Schwimmer* must be read together with the decision of the Supreme Court of New Jersey. *Michael v. Brochchester, Inc.*, 26 N.J. 379, 387 (1958), which said,

"Ordinarily, the construction of a written contract agreement is a matter for the court, but where its meaning is uncertain *or* ambiguous, and depends upon parol evidence admitted in aid of interpretation, the meaning of the doubtful provisions should be left to the jury".

As stated in *Atlantic v. Schwimmer*, page 301,

“Evidence of circumstances is always advisable in the interpretation of an integrated agreement. This is so even whether the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety and in quest of the intention, the situation of the parties, the attendant circumstances and the objects they were thereby striving to attain are necessarily to be regarded”.

Thus, if from the attendant circumstances there is uncertainty as to the fundamental and essential terms of the intended agreement, it is within the legitimate authority of the jury and not the Court of Appeals, to find on all the facts that there was no meeting of the minds. See *Barco Urban Development Corp. v. Housing Authority of Atlantic City*, 674 F.2d 1001, 1007 (3rd Cir. 1982) for principle that where intrinsic evidence is introduced and interpretation is necessary, it becomes a question of fact for the jury.

Petitioner has never tried to vary or contradict the intent but to establish the intent. The Court of Appeals has not only usurped the functions of the jury but has effectively, by ignoring the law of *Atlantic v. Schwimmer*, eliminated the whole law of Contracts as to “meeting of the minds”, under a writing which was intended to form a binding contract. Compare to cases of *Flower City Painting Contractors, Inc. v. Gumina Construction Company*, 591 F.2d 162 (2d Cir. 1979); *Shapiro v. Solomon*, 12 N.J. Super. 377 (App. Div. 1956); *Heim v. Shore*, 56 N.J. Super. 62, 72 (App. Div. 1959); *Sturese v. Pyrene Mfg. Co.*, 9 N.J. 595 (1952).

On the question that the proof as to meeting of minds must deal with the objective intent and not subjective, it is most frustrating to accept a suggestion that there was no expression or manifestation of the intention of Hass. It is difficult to understand that the Honorable John W. Bissell, who presided intently over this case and correctly stated the law as to proof, would have denied the motion for judgment N.O.V. and for a new trial, based on an abundance of manifestations including the contemporaneous requests for change order. There are two items which alone show that there was more than adequate proof of an objective expression that alone are sufficient.

One is that Lou Fulco and Nagin Patel testified that they told Mr. Alan Bernstein, the purchasing agent of Gilbane, that they were bidding only on Architectural and Structural Steel painting in both instances. Mr. Alan Bernstein did not testify so there is no contradiction of this testimony and it was consistent with prior job and as contained in their letter of November, 1980 that no mechanical work would be included. The second item in the testimony of William Kearny, Vice President of Gilbane, who testified that on April 7, 1981 (which is before they bid on what is called Change Order No. 1 and, therefore, had to apply to the originally intended contract), Lou Fulco had been saying that they were not required to do mechanical painting, and Gilbane intended to be included, that he advised the President of Hass that they study the bid documents carefully in making their bid for the separate work. (See Gilbane's main Brief below, page 20.) There was a question of this testimony but, certainly, it is an admission that the intent of Hass was manifest. Nowhere did anyone, on behalf of Gilbane, use the simple words saying that this mechanical work was to be done under this bid, as was done in Change Order from Miller to Gilbane as to other work, and by Gilbane to

Hass for change of office building and other subsequent documents.

POINT IV.

There was no examination made to reconcile jury findings.

The failure to give weight to the fact that both proposals and intended contracts, were signed at the same time and, as testified by Mr. Kearny, were not to be effective until signed on August 18, 1981 after work started, as were other changes to Contract including one which was written in words "Architectural and structural" and fact that the Base Contract referred to drawings that related to plumbing, electrical and other mechanical work and the treatment by defendant of the relationship as an integrated transaction, the Court of Appeals has again deprived Petitioner of its right to trial by jury by failing to recognize the law, as is stated in *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 9 L.Ed. 2d 618, 627 (1963) in dealing with a method of construction as to jury's answer to interrogatory, the Supreme Court said it was "the duty of the Courts to harmonize the answers, if it is possible under a fair reading of them and where there is a view of the case that makes the jury's answer to special interrogatories consistent, they must be resolved that way" and "we, therefore, must attempt to reconcile the jury's finding by exegesis, if necessary . . . before we are free to disregard the jury's special verdict and reverse the case for a new trial".

The Court of Appeals made no such thorough attempted evaluation but readily disposed of the issue, contrary to the decision of Judge Bissell and as argued by Pe-

tioner.⁴ See also case of *Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89 (5th Cir. La.) 1985; *Crossland v. Canteen Corp.*, 711 F.2d 714 (C.A. Tex. 1983); *Smith v. Shell Oil Co.*, 746 F.2d 1087 (C.A. La. 1984); *Machado v. States Marine—Isthmian*, 411 F.2d 584 (C.A. La. 1969); *Julian v. Studley, Inc.*, 407 F.2d 521 (C.A. N.Y. 1969).

Finally, was the Court of Appeals empowered to make new findings or re-examination of the facts under its consideration of the construction of the law or should it have been remanded for a new trial? Petitioner would thus be deprived of a trial by jury for the second time. The Court of Appeals re-examined a portion of the facts, contrary to the applicable cases. See *Mutual Benefit v. Health & Accident Ass'n. v. Brown*, 99 F.2d 856, cert. denied 595 Ct. 485, 306 U.S. 637, 83 L.Ed. 1038 (C.C.A. Neb. 1939); *Griffen v. Matherne*, 471 F.2d 915, rehearing denied, 474 F.2d 1347 (C.A. La. 1973); *Miller v. Royal Netherlands, S.S. Co.*, 508 F.2d 1103 (C.A. La. 1975); *Julian J. Studley, Inc. v. Gulf Oil Corp.*, 407 F.2d 521 (C.A. N.Y. 1969).

Conclusion.

It is most respectfully submitted that the Petitioner has been denied the right to trial by jury by the improper actions of the Court of Appeals and also if there was, in fact, legal error that, at the worst (to Petitioner), the Court should not have re-examined the facts, without even having considered the entire transcript and all the exhibits, but should have sent the case back to the District Court for a new trial. Of course, it is our sincere judg-

⁴See Appendix H attached with portions of findings and decision of Hon. John W. Bissell, taken from our Brief on Appeal.

ment that the decision was fully justified, as within the power and authority of the jury, and should have been sustained.

Respectfully submitted,

GREENBERG MARGOLIS, P.A.

Attorneys for Petitioner

By MILTON M. BREITMAN

Attorney of Record

MILTON M. BREITMAN

Of Counsel and

on the Petition

Dated: December 1989.

APPENDIX A—Order of the United States District Court for the District of New Jersey Denying Respondent's Motion for Judgment N.O.V. and New Trial, Filed March 16, 1988.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

J. I. HASS CO., INC.,

Plaintiff,

v.

GILBANE BUILDING COMPANY,

Defendant.

Civil Action No. 83-1746

This matter having come before the Court pursuant to cross-motions for directed verdict brought by the parties at the close of all of the evidence in this case upon which the Court then reserved decision, motions by the defendant for judgment notwithstanding the verdict, motions by the defendant for a new trial, motions by the defendant for a remittitur, and a motion by the defendant for reduction of the money judgment awarded by the jury; and the Court having read and considered the papers submitted in support of and in opposition to said motions; and the Court having heard and considered the arguments of

counsel; and good cause having been shown for the entry of the within Order,

It is on this 14th day of March, 1988, ORDERED that:

1. Except as set forth in paragraph 2 hereafter, all of the aforesaid motions be and the same hereby are denied; and

2. Defendant's motion for reduction of the money judgment awarded by the jury be and the same hereby is granted to the extent that the award of the jury is reduced by the sum of \$31,000.00 in order that the same not include among plaintiff's damages any costs for its workmen travelling from the plaintiff's trailer to the work area of the Miller Brewery construction site which is the subject of this litigation; and

The entry of final judgment herein be and the same hereby is deferred until decision by the Court as to whether there will be any award of prejudgment interest and, if so, its amount, the same to be determined upon forthcoming written submissions by the parties.

JOHN W. BISSELL
United States District Judge

Filed Mar 14 1988
At 8:30 M
William T. Walsh, Clerk

**APPENDIX B—Judgment of the United States District
Court of New Jersey, Dated May 25, 1988.**

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

J. I. HASS CO., INC.,

Plaintiff,

v.

GILBANE BUILDING COMPANY,

Defendant.

Civil Action No. 83-1746

For the reasons set forth in the Court's opinion filed herewith,

It is on this 25th day of May, 1988,

ORDERED that judgment is entered, *nunc pro tunc*, as of February 25, 1988, the date of the jury verdict, in the amount of \$1,188,621.63 plus \$291,908.00 for a total sum of \$1,480,529.63; and it is further

ORDERED that the total sum of \$1,480,529.63 shall bear Post-Judgment interest from and after February 25, 1988; and it is further

2b

ORDERED that taxable costs are awarded to plaintiff.

JOHN W. BISSELL
United States District Judge

Filed May 27 1988
At 8:30 M
William T. Walsh, Clerk

**APPENDIX C—Notice of Appeal to the United States
Court of Appeals for the Third Circuit, Dated June 8,
1988.**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

J. I. HASS CO., INC.,

Plaintiff,

vs.

GILBANE BUILDING COMPANY,

Defendant.

Civil Action No. 83-1746(JWB)

Notice is hereby given that Gilbane Building Company,
defendant above named, hereby appeals to the United
States Court of Appeals for the Third Circuit from the

final judgment entered in this action by Judgment dated
May 25, 1988.

PECKAR & ABRAMSON, P.C.
70 Grand Avenue
River Edge, New Jersey 07661
Attorneys for Defendant-Appellant
Gilbane Building Company

MARY C. O'CONNELL, ESQ.

Dated: June 8, 1988

Filed Jun 9 1988
At 8:30 M
William T. Walsh, Clerk

**APPENDIX D—Notice of Cross-Appeal as to Interest
Issue Only, Dated June 21, 1988.**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

J. I. HASS CO., INC.,

Plaintiff,

vs.

GILBANE BUILDING COMPANY,

Defendant.

Civil Action No. 83-1746(JWB)

NOTICE IS HEREBY GIVEN that J.I. Hass Co., Inc.,
plaintiff above named, appeals to the United States Court
of Appeals for the Third Circuit from that part of the Fi-
nal Judgment entered in this action by Judgment dated

May 25, 1988, as to the amount of the allowance of interest fixed by the Court below.

LEVY, SCHLESINGER
& BREITMAN, P.A.
3 ADP Boulevard
Roseland, New Jersey 07068
(201) 992-4400
Attorneys for Plaintiff-Respondent

By MILTON M. BREITMAN

Dated: June 21, 1988

Filed Jun 22 1988
At 10:50 AM
William T. Walsh, Clerk

**APPENDIX E—The Written Opinion of the United
States Court of Appeals for the Third Circuit, Filed
August 8, 1989.**

Filed: August 8, 1989

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Nos. 88-5465 & 88-5523

J.I. HASS CO., INC.

v.

**GILBANE BUILDING COMPANY, a corp.
in the State of Rhode Island**

**GILBANE BUILDING COMPANY,
*Appellant in No. 88-5465***

**J.I. HASS CO., INC.,
*Appellant in No. 88-5523***

v.

**GILBANE BUILDING COMPANY, a corp.
in the State of Rhode Island**

**On Appeal from the United States District Court
for the District of New Jersey (Newark)
(D.C. Civil Action No. 83-1746)**

Argued February 28, 1989

**Before: HIGGINBOTHAM, STAPLETON and
COWEN, Circuit Judges.**

(Filed August 8, 1989)

MILTON M. BREITMAN, ESQ. (ARGUED)
Greenberg, Margolis, Ziegler, Schwartz
Dratch, Fishman, Franzblau & Falkin, P.C.
3 ADP Boulevard
Roseland, NJ 07068

Attorney for Appellant-Cross Appellee (Hass)

RICHARD L. ABRAMSON, ESQ. (ARGUED)
Peckar & Abramson, P.C.
70 Grand Avenue
River Edge, NJ 07661

Attorney for Appellee-Cross Appellant (Gilbane)

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This is both an appeal and a cross-appeal from the judgment of the district court awarding the plaintiff-appellant *quantum meruit* compensation pursuant to a jury verdict. The plaintiff-appellant contends that the district court erred in its determination of the prejudgment interest due under the award. The defendant-cross-appellant appeals from the district court's judgment on the merits of this case, contending that the district court misapplied the law and committed reversible trial errors. Upon our review of the record before us and the legal precepts involved, we find for the cross-appellant. Accordingly, we will reverse the district court's judgment and remand for a new trial.

I.

This action arises out of a contractual dispute between a prime contractor and subcontractor, both

of whom were involved in the construction of a brewery for the Miller Brewing Company ("Miller") in Trenton, Ohio. The Gilbane Building Company of Rhode Island ("Gilbane"), one of Miller's prime contractors, entered into a subcontract with the J.I. Hass Company, Inc. of New Jersey ("Hass"), a painting contractor. This subcontract, dated March 24, 1981, was written and executed by both parties and required Hass to perform painting work in certain buildings in the construction project.¹ The subcontract also contained language, standard in the construction trade, allowing Gilbane to direct Hass to perform extra work through the issuance of change orders that increased the subcontract's scope. Under these change orders, Hass was to receive additional compensation in exchange.

Section 7(b) of the parties' subcontract provided for the performance of extra work and the payment thereof as follows:

(b) No changes shall be made in the work except upon the written order of the Contractor; the amount to be paid by the Contractor or allowed by the Subcontractor by virtue of said changes to be stated in said orders. In the event of any additions, the amount of compensation to be paid, as so ordered, shall be determined as follows:

(1) By such applicable unit prices as set forth in the contract, or

1. Gilbane and Hass had also entered into a lump sum subcontract on March 23, 1981, under which Gilbane agreed to pay Hass \$42,870 in consideration for Hass' painting of the Wastewater Treatment Plant. Appendix at 3368. That agreement is undisputed.

(2) If no such unit prices are set forth, then by a lump sum mutually agreed upon by the Architect, General Contractor and Subcontractor, or

(3) If no such unit prices are set forth, and if the parties cannot agree upon a lump sum, then by the actual net cost in money to the Subcontractor of materials and labor . . . plus compensation of 5% for overhead and 10% for profit.

Appendix ("App.") at 3378.

Pursuant to § 7(b), change order no. 1 was entered on June 1, 1981. Under that change order, Hass agreed to paint more facilities for an additional \$753,000. App. at 3466. After Hass had begun performing under change order no. 1, however, a dispute arose between Gilbane and Hass as to whether certain painting of the buildings' "mechanical systems"² fell within the change order's scope. Gilbane directed Hass to perform the work that was disputed. Hass subsequently performed some of the work under protest, submitting a claim for compensation pursuant to the extra work provisions of the subcontract. Gilbane adhered, however, to its interpretation of change order no. 1 as providing Hass with full compensation for the extra work, and rejected Hass' claim for additional compensation.

On May 13, 1983, Hass commenced this action against Gilbane in the United States District Court for New Jersey, which had diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) (1982). Hass not only advanced a claim for compensation for the contested extra work, but also sought, in the first count of its complaint, rescission of the base subcontract on the

2. "Mechanical systems" is a collective reference to the heating, ventilating, and air conditioning system, fire protection system, plumbing system, electrical system, and miscellaneous metallic surfaces.

ground that no contract had formed between the parties. The matter proceeded to trial, and was submitted to the jury upon instructions and written interrogatories. The first interrogatory put to the jury asked:

1. Has plaintiff proven that there was no contract between plaintiff Hass and defendant Gilbane?

App. at 159.

At the end of the first day of deliberations, the jury submitted the following communication to the district court:

Rel[garding] question number 1. We agree that the base contract existed and we agree that there was no meeting of the minds on change order number 1. Confusion arises as to the wording of question number 1. Based on what we agree on, is the answer yes or no to question number 1?

App. at 3239.

Over Gilbane's objection, the district court responded to the jury's question as follows:

Considering the evidence and the Court's instructions as a whole and considering all of the work together, you must determine as a whole whether Hass has proven that there was no contract between the plaintiff Hass and the defendant Gilbane.

App. at 3251-52.

Thereafter, the jury returned with a verdict answering the first interrogatory in the affirmative -- i.e., that there was no contract between Hass and Gilbane. Consequently, the jury awarded Hass \$1,461,872.63 in *quantum meruit* compensation, the

amount owed on Hass' total cost claim,³ including a 21% mark-up for overhead and profit. The jury also found that Gilbane was entitled to a credit of \$242,251 against Hass for a "fair allowance for any defects or omissions in . . . Hass' performance of the work." App. at 161.

Gilbane subsequently moved for judgment notwithstanding the verdict and, alternatively, for a new trial, remittitur, or reduction in the money judgment. The court denied Gilbane's first three motions but granted a \$31,000 reduction in the award of damages. On May 25, 1988, the court entered judgment *nunc pro tunc* against Gilbane in the amount of \$1,188,621.63 plus \$291,908 in pre-judgment interest for a total sum of \$1,480,529.63.

On June 9, 1988, Gilbane filed its notice of appeal as to the final judgment of the district court, and on June 22, 1988, Hass filed its notice of appeal as to the district court's determination of pre-judgment interest due under the award. In addition, we granted leave on January 17, 1989 for the Building Contractors Association of New Jersey ("BCA") to file a brief in this appeal as an *amicus curiae*. We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

II.

Gilbane's principal argument on appeal is that there was a valid subcontract between the parties as a matter of law, irrespective of the dispute as to the scope of work under change order no. 1. On that basis, Gilbane contends that the district court erred in denying its motion for a directed verdict dismissing

3. Hass' total cost claim was \$2,150,028.63, but the jury subtracted from that amount \$688,156 that Gilbane had already paid to Hass. App. at 159.

the first count of Hass' complaint and its motion for a judgment notwithstanding the verdict or, alternatively, for a new trial. Gilbane also contends that the district court erred in denying its motion for a new trial on the basis that the district court, through its supplemental jury instruction, had erroneously rejected the jury's initial determination of the existence of a contract.⁴ Gilbane is joined in its contentions by the BCA.

The applicable standards of review are well settled. In reviewing a district court's denial of a directed verdict, "[w]e must determine whether, as a matter of law, the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief. . . . [I]f the evidence is of such character that reasonable [persons], in the impartial exercise of their judgment may reach different conclusions, the [count] should be submitted to the jury." *Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir. 1978).

Next, when reviewing a district court's denial of a judgment n.o.v., we are required to review the record in this case in the light most favorable to the non-moving party. We will affirm the district court's denial of the motion "unless the record is 'critically deficient of that minimum quantity of evidence from which the jury might reasonably afford relief.'" *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 921 (3d Cir. 1986)(citation omitted).

Given that the district court's denial of the motion for a new trial was based on its application of a legal precept, our review is plenary. *Honeywell v. American*

4. Gilbane also argues on appeal that the district court abused its discretion in admitting certain evidence and in awarding Hass prejudgment interest. Because we are able to dispose of this case on the basis of Gilbane's principal argument, we need not reach these contentions.

Standards Testing Bureau, 851 F.2d 652, 655 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 795 (1989).

Finally, we review the district court's supplemental jury instruction to determine "whether, viewed in light of the evidence, the charge as a whole fairly and adequately submits the issues in this case to the jury." *Bennis v. Gable*, 823 F.2d 723, 727 (3d Cir. 1987). We will reverse the district court "'only if the instruction was capable of confusing and thereby misleading the jury.'" *Id.* (citation omitted).

III.

Our first task upon review is to ascertain whether, as a matter of law, a contract existed between Gilbane and Hass, regardless of their dispute as to the scope of work encompassed by change order no. 1. Since this case arises under diversity jurisdiction, we look to the substantive law of New Jersey, where the district court sits, for guidance. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

Under the law of New Jersey, the central query in the construction of contracts is the intent of the parties. *Kearny PBA Local 21 v. Town of Kearny*, 81 N.J. 208, 221, 405 A.2d 393, 400 (1979); *Barco Urban Renewal Corp. v. Housing Authority of City of Atlantic City*, 674 F.2d 1001, 1008 (3d Cir. 1982). It is not necessarily the parties' true intent, but the intent as expressed or apparent in the writing, that controls. *Friedman v. Tappan Development Corp.*, 22 N.J. 523, 531, 126 A.2d 646, 650 (1956). Where the contract is clear and unambiguous, the determination of the parties intent is purely a question of law within the exclusive province of the trial court. *Gray v. Joseph J. Brunetti Const. Co.*, 266 F.2d 809, 813-14 (3d Cir.), *cert. denied*, 361 U.S. 826 (1959); *Newark*

Publishers Ass'n v. Newark Typographical Union, 22 N.J. 419, 427, 126 A.2d 348, 353 (1956).

Applying these legal precepts to the facts of this case, we find that Gilbane and Hass had entered a valid base subcontract on March 24, 1981, in which Gilbane had agreed to pay Hass \$295,000 in consideration for Hass' painting the architectural and structural surfaces of the Glass Warehouse, Office Building, Powerhouse and Brewhouse facilities in the brewery project. The manifestation of the parties' intent to contract was expressed in the unambiguous language of that contract. Contrary to Hass' assertion that the scope of work under the base subcontract was too vague for there to have been a meeting of the minds on the subject, the subcontract clearly expressed that all painting was to be done "in strict accordance with the [p]lans and [s]pecifications in Rider 'A'" to the subcontract. App. at 3377. Rider A incorporated Section 9F of the second volume of the master specifications, which required painting to be performed in the accordance with the Room Finish Schedules. App. at 3337. These schedules explicitly required the painting of architectural and structural surfaces. App. at 3333, 4107-10. Therefore, we hold that there was a valid base subcontract as a matter of law.

The district court should have entered a directed verdict on the first count of Hass' complaint since the base subcontract clearly existed and no question of fact remained on this issue for jury determination. The district court, however, sent the issue to the jury, which initially found that a base subcontract existed between Hass and Gilbane. The court then compounded its error by not accepting the jury's finding.

Instead of accepting the jury's finding of fact as to the existence of a valid base subcontract, the district court issued supplemental instructions that required the jury to consider the disputed scope of change order no. 1 together with the base subcontract before deciding upon the validity of the subcontract. By doing so, the court erroneously made the "meeting of the minds" standard that is appropriate in determining contract formation conditional upon the parties' having the same understanding of the scope of work under change order no. 1. The New Jersey courts have long stated that the doctrine of mutual assent cannot be misapplied "to impose the requisite that there is no contract unless both parties understood the terms alike, regardless of the expressions they manifested." *Leitner v. Braen*, 51 N.J. Super. 31, 38, 143 A.2d 256, 260 (App. Div. 1958). Since the court's supplemental instructions may have misled the jury into thinking that the existence of a base subcontract was impossible if the parties disputed the scope of work under change order no. 1, we conclude that the district court committed reversible error.⁵

Upon remand, the jury should be instructed only to determine whether Hass performed work that went beyond the scope of change order no. 1 and, if so, what is Hass' appropriate compensation. While the jury initially found that there was no "meeting of the minds" between the parties as to the scope of work under change order no. 1, we find that Hass waived its right to rescind that change order. Under New Jersey law, parties can elect to affirm an otherwise invalid agreement by their conduct, thus barring either party from later seeking rescission. *Merchants*

5. The district court also committed reversible error in not granting Gilbane's motion for a new trial on the basis that a base subcontract existed between the parties as a matter of law.

Indemnity Corp. v. Eggleston, 37 N.J. 114, 137, 179 A.2d 505, 513 (1962). Our review of the record shows that Hass, through its conduct, elected to affirm change order no. 1.

On January 27, 1982, Hass wrote a letter to Gilbane, stating that Hass had been directed by Gilbane's representative to paint the sprinkler pipes in the Packaging and Warehouse Building, and that Hass considered such work to be outside of the scope of change order no. 1. Hass went on to state that it would perform the work under protest and without prejudice to its right to claim additional compensation. App. at 3513. By letter dated August 12, 1982, Hass transmitted four invoices to Gilbane for its painting of the sprinkler pipes and other disputed building mechanical systems, totalling \$144,682. App. at 3529. Each of these invoices was based on the actual costs incurred by Hass for labor and materials, plus a 15 percent mark-up for overhead and profit, as prescribed under § 7(b)(3) of the base subcontract. App. at 3530-33.

The above record shows that Hass, instead of rescinding change order no. 1, affirmed its validity by continuing to work under the change order and by seeking additional compensation for the disputed work. Therefore, we hold that Hass' only claim to additional compensation is for any work that Hass performed that exceeded the scope of change order no. 1. Hass contends that its painting of the canopy walkways, platforms and catwalk on the fermenting tank in the Cold Service Area, as well as its painting of ductwork in the Brewhouse and sprinkler pipes in the Packaging and Warehouse Building, is work that exceeded the scope of the change order. Gilbane, in rejoinder, argues that the Room Finish Schedules incorporated in change order no. 1 unambiguously

obligated Hass to paint the building mechanical systems. Therefore, Gilbane asserts that we must find, as a matter of law, that Hass was required to do the work at issue.

Upon our review of the record, we find the Room Finish Schedule for the Cold Service Area clearly required, under the heading of "Specific Surfaces to be Painted," that Hass paint such structural surfaces as platforms, walkways and catwalks on the fermenting tank. App. at 4111. Moreover, we find the Room Finish Schedule for the Packaging and Warehouse Building clearly prescribed, under the subheading of "Process and Building Piping," that Hass "paint exposed noninsulated ferrous metal," app. at 4114, which undoubtedly includes sprinkler pipes. Given the lack of ambiguity with respect to Hass' obligation to paint the platforms, catwalks and walkways on the fermenting tank in the Cold Service Area, as well as the sprinkler pipes in the Packaging and Warehouse Building, we find, as a matter of law, that Hass was obligated to paint these surfaces. Accordingly, Hass is not entitled to any additional compensation with respect to that work.

We find, however, no clear reference in the Room Finish Schedules under change order no. 1 to Hass' painting of ductwork in the Brewhouse. Indeed, the only reference to painting in the Brewhouse is found in the base subcontract. Yet the Room Finish Schedule for the Brewhouse under the base subcontract also makes no clear reference to any painting by Hass of ductwork. Given the ambiguity that exists in the contract as to whether Hass' painting of ductwork in the Brewhouse was within the scope of work under change order no. 1, the jury must decide this issue. See *Bedrock Foundations, Inc. v. Geo. H. Brewster & Son, Inc.*, 31 N.J. 124,

133, 155 A.2d 536, 541 (1959)(while construction of a written contract is ordinarily a matter of law for the court, where its meaning is unclear and may depend on disputed extraneous testimony, submission to the jury may be required).

If the jury finds that Hass, in painting the ductwork in the Brewhouse, performed work exceeding the scope of change order no. 1, then the jury must decide whether the parties intended that such "excess" work be treated as extra work *under* the subcontract or, instead, be treated as work done *outside* the subcontract.⁶ If the former, then Hass is to be remunerated under the formula prescribed in § 7(b)(3) of the subcontract. If the latter, then Hass is to be remunerated in *quantum meruit* without reference to the subcontract. In any event, because Hass may have performed work beyond the scope of change order no. 1, a judgment notwithstanding the verdict is not warranted in this case.

IV.

For the foregoing reasons, we will vacate the judgment of the district court, and will remand for a new trial consistent with this opinion.⁷

6. The intent of the parties in this matter is a question for the jury since there is no clear language in the contract as to how work done in excess of a change order is to be remunerated.

7. Given our decision to vacate the judgment of the district court, we need not reach the contention raised by Hass in its appeal, *viz.*, whether the district court erred in its calculation of pre-judgment interest.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*

APPENDIX F—Order of the United States Court of Appeals Denying the Petition for Rehearing and to File Reply to Answer to Petition, Filed October 18, 1989.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 88-5465 & 88-5523

J.I. HASS CO., INC.

v.

GILBANE BUILDING COMPANY, a corp. in the
State of Rhode Island

GILBANE BUILDING COMPANY,

Appellant in No. 88-5465

J.I. HASS CO., INC.,

Appellant in No. 88-5523

v.

GILBANE BUILDING COMPANY, a corp. in the
State of Rhode Island

(D.C. Civil Action No. 83-1746)

SUR PETITION FOR REHEARING

Present:

Gibbons, *Chief Judge*, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, and Nygaard, *Circuit Judges*.

The petition for rehearing filed by J.I. Hass, Co., Inc., appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the court in banc, is denied.

BY THE COURT,

A. LEIN HIGGINBOTHAM
Circuit Judge

Dated: October 18, 1989

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

October 13, 1989

Nos. 88-5465 & 88-5523

Re: HASS vs. GILBANE , etc.

Present:

Higginbotham, *Circuit Judge*

1. Notice of Motion by J. I. Hass Co., Inc. to Allow filing of Reply to Answer to petition for rehearing By Way of A Letter.
2. Affidavit by Gilbane Building Company in Opposition to above motion.

CAROLYN HICKS
Deputy Clerk
Direct Dial 597-3143

ORDER

The foregoing Motion is denied.

By the Court,

A. LEIN HIGGINBOTHAM
Circuit Judge

Dated: Oct 18 1989



APPENDIX G—Order of the United States Court of Appeals Denying Motion of Respondent to Amend Judgment to Include Taxation of Costs, Dated October 31, 1989.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 88-5465 & 88-5523

Re: J.I. Hass, Co., Inc. v. Gilbane, Appellant

Present:

Higginbotham, Stapleton and Cowen, *Circuit Judges*

1. Motion by appellant to amend the judgment to include taxation of costs.
2. For your information, the opinion was filed and judgment entered on August 8, 1989.
3. Letter dated August 24, 1989 received from Milton M. Brietman, Esquire in Response to above motion filed by Gilbane Building Company.

SUSAN ACERBA
Deputy Clerk
Direct Dial 597- 5846

2g

ORDER

The foregoing Motion is denied.

By the Court,

A. LEIN HIGGINBOTHAM
Circuit Judge

Dated: October 31, 1989

**APPENDIX H—Portions of Findings and Decision of
Hon. John W. Bissell on Denial of Motion for Judgment
N.O.V. and New Trial.**

On submission of question #1 from the jury, the Court below reviewed the question with the respective counsel in considering whether to refer to the various instruments as separate purported contracts. Hass' counsel argued that the purported agreement had to be considered in its entirety rather than to split the same into separate items. Gilbane's counsel, Ms. O'Connell,² stated the following:

“I'd have to say that it is probably a rare occurrence, but the defendants agree with Mr. Breitman. I don't think it is possible or feasible, given the way this case was presented and the charges originally given to the jury and the relationship between the parties, to split out at this time and try to treat it as if it is two separate contracts”. (A3248).

The Court stated, during argument, as follows:

“I do not accept Ms. O'Connell's statement that they have now determined that there was a Contract and, therefore, that must be accepted as a predicate or basis for future deliberation.

“On the other hand, I am in basic agreement I think with the position of both of you at this time that the jury should endeavor to resolve this matter viewing it as a whole, viewing the work as a whole”. (A3249).

²Ms. O'Connell was appearing on behalf of Gilbane during the absence of Richard L. Abramson, Esq.

As a result of the foregoing, the Court stated, as an answer to the inquiry, that:

“Considering the evidence in the Court’s instructions as a whole and considering all of the work together, you must determine as a whole whether Hass has proven that there was no contract between plaintiff Hass and defendant Gilbane”.

The Court, in its determination on the motion for a new trial or for judgment N.O.V. and, in particular, as to the jurors’ communication No. 1, stated:

“The parties were in agreement that it was inappropriate to bifurcate their deliberations with regard to the construction packages in buildings encompassed by the base contract on the one hand and to involving change order number one on the other.

“I remain of the view that it was appropriate to ask them to consider and answer question No. 1 viewing the relationship, the construction packages, the buildings, the work to be done as a whole determining whether or not a contract had truly come into existence”.

The Court also stated that “the jury in setting forth its question” were not endeavoring to report a partial verdict.

“I might add that three additional days of deliberation ensued before the verdict was returned, so I think it is a perfectly appropriate inference that they would, indeed, re-visit the situation at length in analyzing whether a contract came into existence and I do not agree that their result was by any

3h

means predetermined or affected by the court's directing them to resume their deliberation along the lines indicated". (A3303-A3305).

JAN 23 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1083

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

J.I. HASS CO., INC.,

Petitioner,

— against —

GILBANE BUILDING COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

RICHARD L. ABRAMSON
PECKAR & ABRAMSON, P.C.
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**REFERENCE TO OFFICIAL
REPORT OF OPINION BELOW**

The Opinion of the United States Court of Appeals for the Third Circuit from which Petitioner seeks review of this Court is officially reported as J.I. Hass Co. v. Gilbane Bldg. Co., 881 F.2d 89 (3rd Cir. 1989).

COUNTERSTATEMENT OF THE CASE

The facts relevant to this matter are substantially those set forth in the Opinion of the Court of Appeals. See Appendix E of the Petition.

Basically, Petitioner Hass entered into a Subcontract with Respondent Gilbane (sometimes referred to as "the Base Subcontract") wherein Hass agreed to perform painting work in specifically identified building locations being constructed at a Miller Brewery for \$295,000. Hass also

entered into a change order to the Base Subcontract ("Change Order Number 1") agreeing to perform painting work at other specifically identified building locations at the Miller Brewery for an additional \$753,000.

Both the Base Subcontract and Change Order Number 1 referenced a particular Room Finish Schedule for each building location and required Hass to paint the building systems designated for painting in the applicable Room Finish Schedules. The Base Subcontract Room Finish Schedules only required Hass to paint the architectural and structural portions of the applicable buildings while the Change Order Number 1 Room Finish Schedules, which were issued at a more advanced stage in the design of the Project, required Hass to paint the building

mechanical systems¹ as well as the architectural and structural portions of the applicable buildings.

The Subcontract contained a typical provision for additional compensation to Hass for the performance of extra work. It was under this provision that Change Order Number 1 was issued.

During performance of the work, a dispute arose between Gilbane and Hass as to whether Hass was obligated to paint certain building mechanical systems under Change Order Number 1. Hass subsequently performed some of the disputed work under protest and submitted a claim for additional compensation under the extra work provisions of the Subcontract in the sum of

1 "Mechanical systems" is a collective reference to the building heating, ventilating and air conditioning systems, fire protection systems, plumbing systems, electrical systems and miscellaneous metallic surfaces.

\$144,682.² Thereafter, Hass continued to perform the work under the Subcontract and Change Order Number 1, entered into many more change orders not in dispute, requisitioned for payments under the Subcontract and received payments under the Subcontract through to completion of the work as Hass viewed it.

After completion of the Project, Hass commenced this action in the district court. Hass contended, for the first time, in the First Count of the Complaint, that no contract existed because there was "no

2 The claimed extra work concerned four items of building mechanical painting each in a separate building location. Three of them were part of Change Order Number 1 and the Room Finish Schedules applicable to each of them specifically required Hass to paint the disputed work. The fourth item was for painting of some ductwork in the Brewhouse which was a Base Subcontract Building and which was not shown on the applicable Room Finish Schedules referenced in the Base Subcontract. However, Hass concedes that it painted these ducts on its own and not pursuant to any request by Gilbane. See Appendix below, A2111.33 and A.2111.34.

meeting of the minds" as to the Hass obligation to paint Change Order Number 1 building mechanical systems. Based upon the total absence of a contract, Hass claimed quantum meruit total cost damages that exceeded its Subcontract balance and its claim for the disputed Change Order Number 1 building mechanical painting by more than \$800,000 of alleged cost overruns which were not recoverable under the Subcontract. Alternatively, the Hass complaint sought a Subcontract balance in the sum of \$431,130 and additional compensation in the sum of \$144,682 for the Change Order Number 1 building mechanical painting performed by Hass under the extra work provisions of the Subcontract.

Notwithstanding Gilbane's motion for a directed verdict upon the First Count of the Complaint based upon the existence of a contract as a matter of law regardless of the scope of work dispute, the trial judge submitted the case to the the jury upon jury

instructions and written interrogatories which required the jury to decide whether or not a contract existed between Gilbane and Hass in the first instance. The jury instructions and interrogatories then required the jury to pass over all of the contract claims, upon concluding that no contract existed, and simply determine Hass' entitlement to quantum meruit total cost damages. The first question put to the jury read as follows:

1. Has plaintiff proven that there was no contract between plaintiff Hass and defendant Gilbane?
 Yes___No___

At the end of the first day of deliberations, the jury submitted the following communication to the trial court:

Re Question no.1. We agree that the base contract existed and we agree that there was no meeting of the minds on change order no. 1. Confusion arises as to the wording of Question no. 1. Based on what we agree on, is the answer yes or no to Question no. 1?

Gilbane urged the trial judge to accept the foregoing communication as a jury determination that there was a contract between Hass and Gilbane and instruct the jury to proceed with a determination of the contract claims. Conversely, Hass argued that the Court below should respond to the question by instructing the jury to continue their deliberations with regard to question number 1 and make a determination as to whether, considering the work as a whole, there was or was not a contract.

Over Gilbane's objection, the Court below responded to the jury question as follows:

I can only answer that at this time as follows: Considering the evidence and the Court's instructions as a whole and considering all of the work together, you must determine as a whole whether Hass has proven that there was no contract between the plaintiff Hass and the defendant Gilbane.

Thereafter, the jury returned with a verdict answering Question number 1 in the

affirmative, i.e., that there was no contract between Hass and Gilbane. In accordance with the Court's instructions the jury found that Hass was entitled to quantum meruit total cost damages. This resulted in an award to Hass of substantial claimed cost overruns without any determination of contractual or other legal entitlement.

Thereupon, Gilbane moved for judgment notwithstanding the verdict pursuant to Fed.R.Civ.P. 50(b) and for a new trial pursuant to Fed.R.Civ.P. 59(b), both of which were denied by the trial judge.

The Statement of the Case in the Hass Petition consists largely of self-serving contentions taken out of context. In many cases, Hass alleges facts that are not even supported by the Record.

In any event, most of the facts asserted in the Hass Petition deal with alleged communications predating the execution of the Base Subcontract and Change Order Number 1 which Hass contends evidence

an intent to exclude building mechanical painting from Change Order Number 1.³ As such, they are irrelevant to the holdings set forth in the Opinion of the Court of Appeals which are based, in the first instance, upon the existence of a contract regardless of the scope of work dispute and, in the second instance, upon the unambiguous provisions of the contract regarding scope of work. They are also irrelevant in light of Hass' conceded knowledge that Change Order Number 1 included painting of the building mechanical systems before entering into the Change

3 In fact, most of the Hass factual allegations consist of inadmissible parol evidence. In footnote 4 of the Opinion of the Court of Appeals, the Court specifically states that it is unnecessary to even address the admissibility issue because the underlying factual allegations are irrelevant to its ruling.

Order. A877, A961, A962, A993 and A994.⁴
This latter fact was conveniently omitted
from the Hass Statement of the Case.

SUMMARY OF ARGUMENT

There are no special and important
reasons for granting a writ of certiorari in
this case.

The Court of Appeals simply applied
settled principles of appellate review to
the trial court's denial of Respondent's
motion for a directed verdict and for
judgment n.o.v., as well as basic principles
of New Jersey contract law, all of which are
fully enunciated in the Opinion. In fact,
the Petitioner does not even challenge the
principles of law enunciated by the Court of
Appeals. Rather, Petitioner's arguments are

4 Reference is to Appendix below. Citations to the
Appendix below for the other facts contained in this
Counterstatement of the Case are substantially
contained in the reproduction of the unreported
Opinion of the Court of Appeals set forth as Appendix
E in the Petition.

all based upon the application of the law to the particular circumstances of this case. Consequently, the issues raised in the Petition totally lack the special importance to the public, as distinguished from the parties, necessary for granting a writ of certiorari pursuant to the Rules and policy of this Court.

The Opinion of the Court of Appeals is simply a recognition that Gilbane and Hass entered into a contract and they are bound by its terms. As such it is legally and logically unassailable. It is grounded upon settled principles of New Jersey contract law that are cited in the Opinion.

The Hass Petition is nothing more than a restatement of confusing rationalizations that do not even contradict the existence of a contract between the parties when placed under scrutiny.

The Petitioners attempt to elevate the determinations of the Court of Appeals to a denial of Hass' Seventh Amendment right to

trial by jury is totally without merit. The Seventh Amendment only entitles a civil litigant to have disputed issues of fact tried by a jury. The determinations of the Court of Appeals were entirely grounded upon questions of law within the exclusive province of the trial judge pursuant to governing New Jersey law.

POINT I

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI IN THIS CASE

A writ of certiorari will only be granted by this Court when there are special and important reasons to do so. Supreme Court Rule 17. The special and important reasons required for granting a writ of certiorari are with respect to the public in general as distinguished from the parties alone. Rice v. Sioux City Memorial Park Cemetary, Inc., 349 U.S. 70, 75 S.Ct. 614 99 L.Ed. 894 (1955). No such special and

important reasons exist in this case. Rather, the Petition merely seeks plenary review of an unfavorable decision of the Court of Appeals.

The Court of Appeals simply applied settled principles to appellate review to the District Court's denial of Respondent's motion for a directed verdict and judgment n.o.v., as well as basic principles of New Jersey contract law, all of which were enunciated in the Opinion. See, J.I. Hass Co. vs. Gilbane Bldg. Co., 881 F.2d 89, 92-94 (3rd Cir. 1989). Petitioner does not even challenge the statement of governing law by the Court of Appeals. Rather, Petitioner's arguments are all based upon the application of the law to the particular circumstances of this case and, thereby, lack the requisite public importance for granting a writ of certiorari.

Petitioner mischaracterizes its arguments for review in terms of a denial of its constitutional right to a jury trial in

an effort to create special and important reasons for granting certiorari. In fact, the jury determination in this-matter was limited to the non-existence of a contract between the parties which should have been decided by the trial judge as a matter of law. The same holds true with respect to the unambiguous terms of the contract as stated in the Opinion of the Court of Appeals which were also questions of law within the exclusive province of the trial judge pursuant to New Jersey law. See, Gray v. Joseph J. Brunetti Construction Co., 266 F.2d 809, 813, 814 (3rd Cir. 1959); Newark Publishers Ass'n v. Newark Typographical Union, 22 N.J. 419, 427, 126 A.2d 348, 353 (1956).

The Seventh Amendment only entitles a civil litigant to have disputed issues of fact tried by a jury. See, U.S. Const. Amend VII. The power of a judge to pass upon questions of law is just as much an essential part of the "jury trial"

guaranteed by the Seventh Amendment as the power of the jury to pass on questions of fact. Diederich v. American News Co., 128 F.2d 144 (10th Cir. 1942). It is well settled that the Seventh Amendment does not require a jury trial where there are no facts in dispute. Coleman v. C.I.R., 791 F.2d 68 (7th Cir. 1986).

The Opinion of the Court of Appeals in this case was grounded entirely upon questions of law and, therefore, the right to a jury trial guaranteed by the Seventh Amendment never comes into play. Coleman v. C.I.R., Id.

This Court has long since sanctioned the principles of appellate review applied by the Court of Appeals in this case and upheld the judicial application of directed verdict and judgment n.o.v. procedures against Seventh Amendment challenges. Baltimore & Carolina Line v. Redman, 295 U.S. 654, 55 S.Ct. 296, 79 L.Ed. 603 (1935); Galloway v. United States Products Co. v. Champlin, 283 U.S. 494,

51 S.Ct. 513, 75 L.Ed. 1188 (1931). See, also Slatton v. Martin K. Eby Constr. Co., Inc., 506 F.2d 505 (8th Cir. 1974), cert. denied, 421 U.S. 931, 95 S.Ct. 1657, 44 L.Ed 2d 88 (1975); King v. United Benefit Fire Ins. Co., 377 F.2d 728 (10th Cir. 1967) cert. denied, 389 U.S. 857, 88 S.Ct. 99, 19 L. Ed.2d 124 (1967); Cox v. City of Freeman, Mo., 321 F.2d 887 (8th Cir. 1963); Whitsell v. Alexander, 229 F.2d 47, cert. denied, 351 U.S. 932, 76 S.Ct. 783, 100 L.Ed. 1461 (1956).

This would be a terrible case under any circumstances for the United States Supreme Court to make important constitutional pronouncements. The Hass quantum meruit claim based upon the non-existence of a contract did not result from a good faith effort to fashion a remedy for the scope of work dispute upon which it is purportedly based. Rather, it was simply an effort to circumvent the express terms of a contract and attempt to recover damages

having nothing to do with scope of work without even proving that Gilbane committed any wrongdoing.

POINT II

THE OPINION IS LOGICALLY AND LEGALLY CORRECT AND THE PETITIONER'S ARGUMENTS TO THE CONTRARY ARE WITHOUT MERIT.

The balance of the Hass Petition is mainly a restatement of parol evidence and other collateral allegations that are irrelevant to the Opinion of the Court of Appeals. In fact, the Opinion is entirely grounded upon the following elementary determinations that are not even in dispute:

1. The parties entered into a valid Base Subcontract, the terms of which are not disputed. Even the jury found this to be true.
2. With full knowledge of the scope of work dispute regarding Change Order Number 1, Hass affirmed the Change Order and elected to pursue its remedies under the extra work provisions of the Subcontract. The logic of prohibiting a subsequent rescission is inescapable.
3. Change Order Number 1 clearly and unambiguously required Hass to paint three of the four building mechanical systems in question. In this regard, the testimony of the Hass Project Executive as to the requirements of Change Order Number 1 was identical to the findings set forth in the Opinion. A838, 839, 850 and 859.

Placed in its most favorable light, the Hass Petition presents factual and legal arguments that may bear tangentially upon whether Change Order Number 1 required Hass to paint building mechanical systems and whether Hass was entitled to recover additional compensation totaling no more than \$144,682 for the performance of extra work. However, the Hass Petition hardly addresses the primary holding that there was a contract between the parties regardless of the scope of work dispute. Nor does Hass explain how a dispute about a change order can negate the existence of the underlying contract that is not even in dispute and that was specifically found to exist by the jury.

It is academic that a court should never frustrate the intention of the parties to be bound by a contract unless necessary to bring about a fair and just result to a particular controversy. See Paley v. Barton Savings and Loan Ass'n, 82 N.J. Super 75,

83, 196 A.2d 682 (App. Div. 1964) . See, also 1 Corbin, Contracts §895, page 400 (1963). The foregoing principle was recently confirmed by this Court in Texas v. New Mexico, 482 U.S. 124, 107 S.Ct. 2279, 2284, 96 L.Ed. 2d 105, 114 (1987) which reasoned as follows:

But good faith differences about the scope of contractual undertakings do not relieve either party from performance. A court should provide a remedy if the parties intended to make a contract and the contract's terms provide a sufficiently certain basis for determining both that a breach has in fact occurred and the nature of the remedy called for. Restatement (Second) of Contracts §33(2), and Comment b (1981). There is often a retroactive impact when courts resolve contract disputes about the scope of a promisor's undertaking; parties must perform today or pay damages for what a court decides they promised to do yesterday and did not.

In the instant case, there was absolutely no reason to even consider the non-existence of a contract. Assuming a legitimate dispute as to Hass' obligation to paint the Change Order Number 1 building mechanical systems, the extra work

provisions of the Subcontract afforded the appropriate vehicle for complete relief. In fact, that is the customary manner for resolving scope of work disputes in the construction industry and the manner chosen by the parties themselves before the posturing of this litigation.

Even viewing the scope of work dispute in the context advanced by Hass, the issue of "a meeting of the minds" applies only to the Hass obligation to paint building mechanical systems under Change Order Number 1. Therefore, if quasi-contractual relief were necessitated to achieve "a fair and just result" such relief should have been limited to the building mechanical work actually performed by Hass rather than the entire contractual relationship. This would have afforded Hass complete relief with respect to the scope of work dispute without otherwise depriving Gilbane of its rights under the Subcontract. This is exactly what the Court of Appeals instructed the trial

court to do in the event that the jury were to find that the Hass painting of ductwork in the Brewhouse was not intended to be dealt with pursuant to the extra work provisions of the Subcontract.

The fact that the parties continued to perform in every respect under the Subcontract for more than a year after the scope of work dispute was unquestionably known to both of them, and they even treated the dispute as coming under the extra work provisions of the Subcontract, makes the denial of contract existence even more absurd. Hass does not even deny its own affirmance of the Subcontract which constitutes an election of remedies and precludes the contrary position that no contract existed after performance was rendered. See, Merchants Indemnity Corp. v. Eggleston, 37 N.J. 114, 130-131, 179 A.2d 505, 513 (1962). See also, Restatement Second of Contracts, §380 and §380 Comments "a" and "b" (1979); Restatement of Restitution, §64 and §68 (1937).

The Opinion of the Court of Appeals cites Merchants Indemnity Corp. v. Eggleston, supra, as expressing the governing law of New Jersey with respect to election of remedies. The Hass Petition does not even dispute the applicable principles of law expressed by the New Jersey Supreme Court in Merchants Indemnity. Rather, the Hass efforts to distinguish Merchants Indemnity are based solely upon the fact that it concerned an insurance contract and not a construction contract which has nothing to do with the applicable legal principles expressed.

The Hass Petition references a Change Order Number 1 Room Finish Schedule as causing confusion because it was issued after Hass estimated the Change Order Number 1 work. However, Hass omits to disclose that all the other Change Order Number 1 Room Finish Schedules, which required the painting of building mechanical systems, were issued prior to estimating Change Order

Number 1. A4111, A4112, A4146 and A4114.

Additionally, the Change Order Number 1 Room Finish Schedule, that Hass complains about, was issued to Hass with a Request for Change Quotation long before Change Order Number 1 was entered into. A2641-A2650, A3441 and A3451.

The Hass propensity for confusing rationalization is typified by its reference to trial Exhibit P76 as consisting of two charts prepared by Gilbane and purportedly depicting the scope of Gilbane's painting obligation to Miller and Hass' painting obligation to Gilbane. However, there was no testimony in the Court below as to who prepared these charts, the circumstances of their preparation and what they purport to show.

All of the comments in the Hass Petition regarding the scope of work dispute suffer the same infirmity as the contentions specifically addressed above. When placed under scrutiny they have nothing to do with

the scope of Hass' contractual undertaking. Rather, their ultimate purpose is to confuse the fact that Change Order Number 1, on its face, clearly required Hass to paint building mechanical systems and that those requirements were fully known to Hass when Change Order Number 1 was entered into.

Additionally, all of the Hass factual contentions consist of parol evidence seeking to contradict the terms of an integrated agreement and should have been excluded from evidence by the Court below.

It is well settled in New Jersey law, properly recognized by the Court of Appeals in its Opinion, that the objective intent of parties manifested by their written agreement governs the interpretation of a contract. Banco Urban Renewal Corp. v. Housing Authority of City of Atlantic City, 674 F.2d 1001, 1008 (3rd Cir. 1982); Kearny PBA Local 21 v. Town of Kearny, 81 N.J. 208, 221, 405 A.2d 393, 400 (1979). Friedman v. Tappan Development Corp., 22 N.J. 523, 531,

126 A.2d 646, 650 (1956) ; Leitner v. Braen, 51 N.J. Super. 31, 38, 143 A.2d 256, 260 (App. Div. 1958). Hass does not even disagree with this principle.

However, Hass does not identify anything in the Subcontract documents inconsistent with the holding in the Opinion of the Court of Appeals that Change Order Number 1 included the painting of building mechanical systems or consistent with Hass' position to the contrary. Rather, Hass continues to rely entirely upon extraneous factors in support of its position. Also, aside from a few confusing and somewhat incomprehensible rationalizations, Hass virtually ignores the Room Finish Schedules which the Project Specifications reference as defining the scope of Hass' work (A3336 and A3337) and the testimony of its own Project Executive to that effect (A838-A839, A850 and A859). The Hass Petition similarly fails to reconcile its admitted knowledge when Hass entered into Change Order Number 1 that it

required the painting of building mechanical systems (A877, A961-A962, A993 and A994).

Contrary to the confusing characterizations in the Hass Petition, the scope of painting work is not difficult to discern from the Subcontract documents. The Base Subcontract and Change Order Number 1 each identify the buildings to be painted and refer to Rider "A" for the particular painting requirements for each building. A4155, A3466. In each case, Rider "A" references a Room Finish Schedule for each building and Section 9F of the Project Specifications directs Hass to paint the building elements designated for painting on the Room Finish Schedules. See specifically A3336, Section 1.1.3. This is exactly how it was described by the Hass Project Executive (A838-839, A850 and A859) and in the Opinion of the Court of Appeals.

The fact that Hass was not obligated to paint building mechanical systems under the Base Subcontract but was obligated to

paint building mechanical systems under Change Order Number 1, and that Hass knew it, is independently verified by the exclusions listed in the Pre-Award Meeting Minutes applicable to each of them. See Rider "B", Section 20 of A4093, A3453 and A2981-2992.

Finally, the fact that the Base Subcontract and Change Order Number 1 were physically executed on the same day is meaningless. The essential underpinnings of the Opinion of the Court of Appeals remain the same, i.e., a valid Base Subcontract was entered into and Hass affirmed Change Order Number 1 with full knowledge of the scope of work dispute and elected to pursue its remedies under the extra work provisions of the Subcontract.

CONCLUSION

For the reasons set forth herein and in the Opinion of the Court of Appeals from which review is being sought, Respondent

Gilbane Building Company⁵ respectfully requests that the Petition for a Writ of Certiorari of J.I. Hass Co., Inc. be denied.

DATED: River Edge, New Jersey
January 22, 1990

Respectfully submitted,

RICHARD L. ABRAMSON

PECKAR & ABRAMSON

A Professional Corporation

Attorneys for Respondent

Gilbane Building Company

5 Pursuant to Supreme Court Rule 28.1, there are no parent companies or subsidiary companies (except wholly owned subsidiaries) of Respondent Gilbane Building Company and the only affiliate of said corporation is B.T. Equipment Company, Inc.



3
CORRECTED BRIEF
No. 89-1083

Supreme Court, U.S.
FILED

FEB 8 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

J.I. HASS CO., INC.,

Petitioner,

against

GILBANE BUILDING COMPANY,

Respondent.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY**

**Reply Brief to Respondent's Brief in Opposition to Petition
for a Writ of Certiorari**

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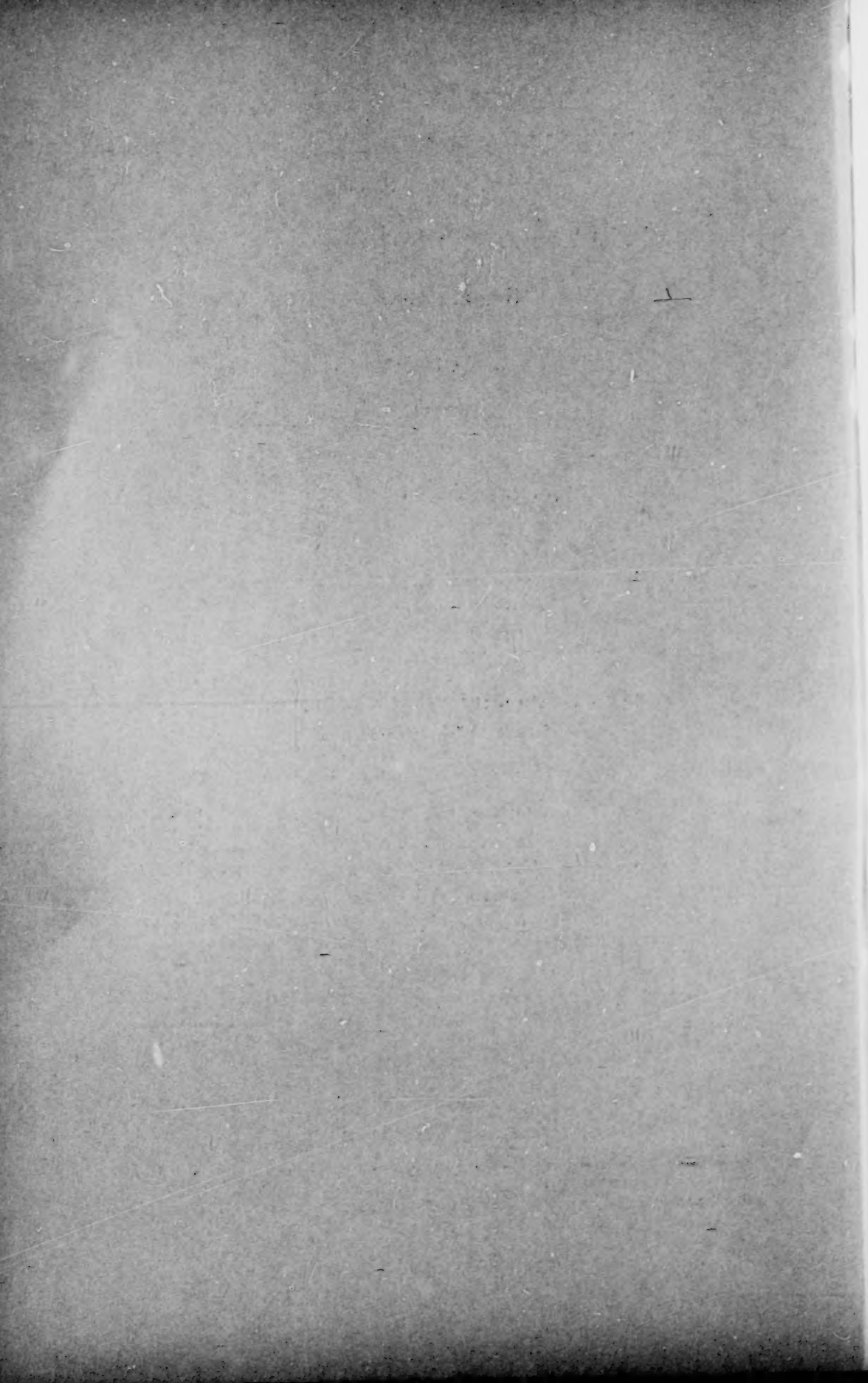
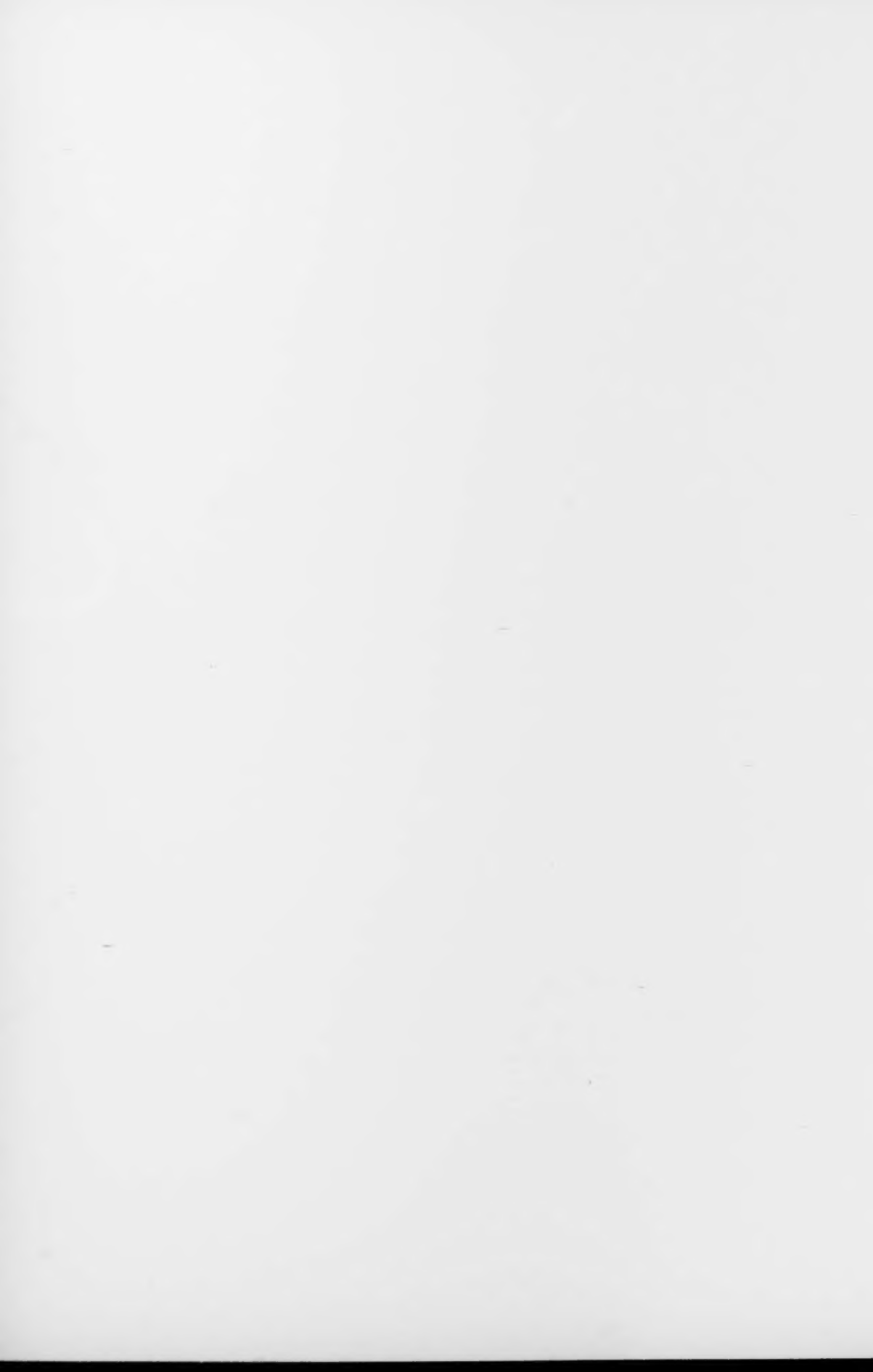


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No. 89-1083

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989.

J.I. HASS CO., INC.,

Petitioner,

against

GILBANE BUILDING COMPANY,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

**Reply Brief to Respondent's Brief in Opposition to
Petition for a Writ of Certiorari.**

Preliminary Statement.

The purpose of this reply to Respondent's Brief in opposition to Petition, is to counteract or contradict some salient assertions that may be misleading to the Court in its consideration of the special and important reasons for granting the Writ of Certiorari. We will, of course, rely upon our Petition filed in this matter as the prime basis for our Petition.

POINT I.

Special and important reasons have been established for granting of Petition for Writ of Certiorari.

The prime issues serving as the reasons for granting the Writ, as stated in the Petition, pertains to the power or right of the Court of Appeals to make a *de novo* review as to the factual issues resolved and determined by the jury, after proper charges by the trial Court. It is apparent that Courts of Appeal should not take upon itself to make new decisions as to the facts and law, without having defined any clear erroneous error of law, and in conflict with the general enunciations of the principles of law, both Federal and New Jersey, which is a clear denial to the successful party of its Constitutional right to trial by jury under the Seventh Amendment.

It is respectfully submitted that the very tenor of the Brief of the Respondent in opposition to the Petition, as demonstrated by the statements and legal positions contained in the Brief of Respondent in opposition to the Petition for a Writ of Certiorari gives the reason for granting the Petition.

We have separated the Reply into two sections—one where we respond to many of the basic arguments of the Respondent, and the other as to specific references to testimony and exhibits by Respondent, which are not supported by a reading of the record of the trial of the case.

1. Response to Arguments of Respondent.

The recitation of the assertions of the Respondent, which are repeated in many sections of its Brief in opposition are frequently and materially mis-stated or stated to give a portion of the testimony and ignoring in some cases the redirect testimony, to present a distorted picture, which they hope will be believable, if repeated more than twice, all of which very sufficiently demonstrates that we were

dealing with factual differences and disputes and not legal issues. These very arguments were stated to the jury for days of summation and not found by the jury to be the credible proof by a preponderance of evidence.

The Respondent who infers, at the bottom of page 8 that Petitioner was improperly dealing with matters and circumstances surrounding the intended Contract, in accordance with *Atlantic Northern Airlines, Inc. v. Schwimmer*, 12 N.J. 273, 301 (1981) and *Barco Urban Development Corp. v. Housing Authority of Atlantic City*, 674 F.2d 110 (3rd Cir. 1982), spends most of its factual assertions to support its position in the testimony as to events surrounding the purported contract to justify its argument.

It is truly regrettable that Respondent, in its counter-statement of the case, ignores the very essential facts—first that the purported originally designed contract and Charge Order No. 1 were both signed and executed at the same time and place, which was an essential basis on which Judge John W. Bissell founded his response to the jury's inquiry during their deliberations and to which Respondent agreed that they both had to be considered together and, secondly, that they fail to acknowledge the mis-statement of the Court of Appeals that the work for the separate buildings was not generated by the change order provisions of the purported contract under Paragraph 7b, but put out on an invitation to bid to several painting subcontractors and Petitioner was the successful bidder. It was not made pursuant to the provision as to change order of the proposed Subcontract, referred to as Base. The statement on page 3 of Respondent's Brief that Change Order No. 1 was issued under the provision for performance of extra work as "Base Subcontract" belies the true facts of the case—which cannot be disputed.

Again, on page 2 of Respondent's Brief, it states Room Finish Schedules were provided for each building. It says that the original building provided for architectural and structural painting. Nowhere does Respondent refer to the drawing referenced in the original proposed agreement to all the plumbing, HVAC, fire protection, electrical, etc.—mechanical systems.

Nowhere does Respondent mention that the bid for the Packaging and Warehouse building was some 65% to 70% of the total work nor does it deny, because the testimony and proof was clearly to the contrary, that the Room Finish Schedule for the other buildings included work which was intended to include the Process Piping and Equipment Package mechanical work to be let out directly by Miller nor that there was tunnel work stated in Room Finish Schedule which was not included in Hass' contract, or that there were three to four other painters doing painting, as well as painters doing work for the mechanical subcontractors, all of whom used the same Room Finish Schedules.

On pages 4 and 5 of our Petition for Writ of Certiorari, we state the fact, above related, that under date of March 31, 1981, the work for the additional buildings was let out by a formal invitation to bid and not as a Request for Change Order, pursuant to the original intended "sub-contract", to various painting subcontractors and the proposal of Hass, which was required and, in fact, submitted by 4:10 P.M. on April 15, 1981. The bid was based upon the drawings as to Packaging and Warehouse building (which constituted 65% to 70% of the combined Contracts) that were available to Hass prior to April 15, 1981, which did not include mechanical work.

Respondent argues on pages 22 and 23 of its Brief that even if Hass did not receive the updated Room Finish Schedule for the Package and Warehouse building that it did have them when a Request for Change Order was

issued. When we read the Appendix references cited, we find that the reference is the request for GC1E. Its argument is a complete fallacy. Respondent fails to say such request had an issue date of April 27, 1981 and it did not say that at A3449, there is (1) a notation that this RCQ was for the amount of \$8,950.00 for extras, a small fraction of the claimed mechanical work, (2) that it covered the extra of "Exterior Precast Concrete Panels"; that (3) the drawing list on A3442 is incomplete with notations that demonstrate our argument of the non-existence or incomplete status of listed drawings; and that (4) the references to the specific building "Packaging and Warehouse" in A3447 refer only to Architectural and Structural drawings and, (5) most importantly, omitted by Respondent is that the items which dealt with Process Piping and Equipment Package and mechanical, which Petitioner testified to and established, was for future bidding by Miller and/or Gilbane, was not received, according to all testimony (and as contained by Gilbane's stamp) until on or after April 30, 1981. These are contradicted and uncontradictable facts which the Court of Appeals did not recognize in its usurping of the jury's deliberative process, and which the Respondent continues to put forth. The testimony, as stated by Petitioner, is that these additional drawings and a considerable portion of revised drawings were not received by Petitioner until after August 17 or 18, 1981.

Respondent on page 8 says that Petitioner has taken facts out of context and, in many cases, Hass alleges facts that are not even supported by the record. Not only has Respondent not listed one such failure so that it can be refuted but for Respondent to state that Change Order No. 1 was issued pursuant to Section 7b in the purported Subcontract, for additional compensation for extra work is an impropriety since a reading of the language of Section 7b will show its inapplicability. The recitation of all the facts including that of William Kearny for Gilbane and Nagin Patel and Louis Fulco for Hass, that they visited the project

site on April 7, 1981, as did other building subcontractors for all trades including painters, for purposes of obtaining information as to bidding for the separate buildings, as to the discussion that the understanding with Alan Bernstein, the purchasing agent for Gilbane, which was not disputed, established that the bid would be only for architectural and structural work. (A 306, A 307, A 34, A 1194, A 1559, Transcript p. 856-859.) (A 1230-A 1232.) Since Hass was the successful bidder, Gilbane, who prepared all the documents which failed to have express language that it included the "mechanical work", for its convenience, it was set out as a change order.

Respondent says on page 13 that Petitioner does not even challenge the statements of governing law by the Court of Appeals. This is pure nonsense. The Petitioner brings into focus the legal issue of the power of the Court of Appeals to retry issues of fact *de novo* or substitute its judgment with respect to such issues for that of the trier of the facts. *Lame v. United States Department of Justice*, 767 F.2d 66, 69 (3rd Cir. 1985) and other cases cited, raises the question whether it can be stated that because trial court denied the motion for a new trial, or to set aside on a N.O.V. motion and then say that it is a legal issue and destroy the process of the right to trial by jury. Can it blithely ignore the cases of *Atlantic Northern Airlines, Inc. v. Schwimmer, supra*, and other cases; can it cite the case of *Merchants Indemnity Corp. v. Eggleston*, 37 N.J. 114 (1962) and says it applies to the factual situation of this case, when it is directly opposite.

That case, incidentally, is not a case of election of remedies, as was and is urged by Respondent, page 22, but one of waiver of estoppel where there was no reservation of rights and an affirmance. The only use of word "election" is not as to choice of remedies but only that carrier elected to affirm the contract, later alleged to be the subject of fraud.

Can they truly say there was an affirmance when all the facts are that on December 15, 1982 Hass said it had concluded all its work and refused to do the many hundreds of thousands of dollars of work that Gilbane said they were required to do as to mechanical work. Contrary to the implication on page 21, the only work, excepting therefrom protest items, Hass did and, as known to Gilbane, was architectural and structural work, and it may well be said with more conviction, that Gilbane affirmed a contract for architectural and structural work by not rescinding or terminating a contract where Hass did not and refused to do any other mechanical work. There is testimony that Gilbane gave notice of an intention to terminate if they did not do the work—but they did not and thus Gilbane, in fact, affirmed Hass' position of no requirement.

Did the Court have the right to ignore that on the work done by Hass, under protest for \$144,682.00, it was also protested by Gilbane's project manager, David A. Ricke, was not within its scope of work and that they would seek compensation. No attempt is made to answer or reconcile this.

The very strong proof of the direction of the argument of Respondent that the Court of Appeals was dealing with factual questions appears on page 23 where Respondent uses some nice phrase instead of common sense, to refer to "Hass preposity for confusing rationalization is typified by its reference to trial (Exhibit 76) as to two charts prepared by Gilbane". It is an admission that these charts are devastating to Respondent's rationalization of approach at the trial stage of saying that the originally intended contract did not include mechanical items and the so-called Change Order No. 1 did. All this notwithstanding, Respondent still says that Hass did the work on the Brew-house, a mechanical item, without direction of Gilbane, without a right of payment, even though it was not in the "Base Contract" which it says could not require anything but architectural and structural painting.

These two charts by the proof accepted by the Court in its admission of the exhibit and the acceptance by the jury, came about in the discovery process from the files of Gilbane and its corporative references of the one chart to the other, left no doubt that these were the products of Gilbane. In no event did Gilbane ever attempt to explain how they otherwise got into their files. What they purport to show is very clear and why the Respondent doth protest so much about its having been used.

In the entire involvement of the Respondent, is an attempt to avoid the very salient facts that the Room Finish Schedule is not an end to all the issues of scope of work.

2. Specific References by Respondent which are Contrary to Record.

a) On page 4, not 2, says "Hass concedes that it painted these ducts [in the Brewhouse building of "Base Contract] on its own and not pursuant to any request of Gilbane". It refers to Appendix A 2111.23 and A 2111.34. A reading of this transcript will show not only was this the testimony of Augustus (Gus) Quarantello, who was a worker in the field not a representative of Hass, but a reading of the transcript will show there is only a reference as to whether he "did not do the work under protest" but did not concede they did it on their own, or that there was a request by Gilbane to any one else, or that it was not protested by the representatives of Hass. The great fallacy of Gillbane's trial tactics is, if it was so clear that such mechanical work as painting ducts in the Brewhouse was not part of Hass' scope, and here it was painted and not paid for by Gilbane, destroys the position of the clear difference of so-called "Base Contract" and Change Order No. 1. Not referred to, of course, is the testimony of Louis Fulco (A 963), who was the project manager representing Hass, says "it painted 'ducts in the Brewhouse' under protest".

b) At the bottom of page 9 and top of page 10 of Respondent's Brief, it speaks of Hass, conceded knowledge that Change Order No. 1 included painting of the building mechanical system before entering into the Change Order. To say that this is a fact and not referred to by Hass' statement of the case, is most absurd. The whole case of plaintiff is replete with Hass' contention that it was not included and so recognized by Hass' representative's discussion with Alan Bernstein, purchasing agent of Gilane, and the fact that concurrently with that time, RCQ 115G was issued for mechanical work in a "Change Order Number 1" building—(cold service area) and many other sections, as on pages 14, 15, 16, 17 and 18 of the Petition and as well as page 23. The reference to the Appendix on page A961 does not nor does A962 say anything about knowledge and A963 a question to Mr. Fulco as to whether before C.O. signed, if became aware of expanded scope of painting, the answer is "not at all". As to the ducts in Brewhouse, Fulco replied it was done "under protest". Completely omitted from Respondent's Brief is the redirect testimony of Fulco. He testified by way of explanation of the "yes or no" cross-examination, is that they expected to do this mechanical work by future Request for Change Quotations—A998. He also testified work was protested before it was done—A996. This further demonstrates that we were dealing with factual interpretations and not legal issues.

c) On page 22, Respondent states that Hass "omits to disclose that all other Change Order No. 1, Room Finishing Schedules, with mechanical work, were issued prior to estimating Change Order No. 1". Petitioner has dealt with this throughout its Petition and entire trial of the case by showing the incompleteness of drawings, non-existence of drawings and its use for future contracts.

d) On page 23 it states so outrageously inaccurate that a Change Quotation issued before Change Order No. 1 was

entered into, which refers to RCQ GC1E, dated April 27, 1981 in the appendix references, is considered above on pages 4 and 5.

e) On the bottom of page 26, references are made to A838-839, A850 and A859 as proving the scope of work, described by Hass' Project Executive. The question is whether they "looked at" Room Finish Schedule and "relied upon it" and on "Section 9F of specification"—isn't it true". The answer was, "Yes, that is true". It does not elicit, as does the whole of the testimony, how much more there was to the considerations and reliances such as necessity of drawings. A850 does not establish anything and A859 does not bear any testimony to support the vague charges of Respondent.

CONCLUSION.

The Respondent's Brief gives the most substantial reasons to the manifest injustice that would be suffered by Petitioner if the denial of Petitioner's right to trial by jury, should be taken from the Petitioner.

Dated: Roseland, New Jersey
February 5, 1990.

Respectfully submitted,

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Inc.

